IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-832

EDWARD R. JAGNANDAN, *et al.*,

Petitioners,

v.

WILLIAM L. GILES, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARK SHENFIELD
Urban Law Institute of the
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009
202-265-9500

PATRICK O'ROURKE
American Civil Liberties Union
of Mississippi
520 N. President Street
Jackson, Mississippi 39201
601-355-7495

Attorneys for Petitioners

Of Counsel:

MELVIN L. WULF
American Civil Liberties Union Foundation
22 East 40th Street
New York City, New York 10016

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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VS

WILLIAM L. GILES, et al., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Edward R. Jagnandan, Leonard S. Jagnandan, and Reverend W.L. Jagnandan, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on September 20, 1976.

Opinions Below

The opinion of the Court of Appeals, reported at 538 F. 2d 1166, is set out in the Appendix, infra, at pp. 1a-68a. The opinion of the United States District Court for the Northern District of Mississippi, reported at 379 F. Supp. 1178, is set out in the Appendix, infra, at pp. 69a-95a. The order of the district court is set out in the Appendix, infra, at pp. 96a-98a.

Jurisdiction

The judgment of the Court of Appeals was entered on September 20, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented For Review

Respondent officials of Mississippi State University exacted almost $3500 in tuition and fees from the Petitioners, alien students, in violation of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Nevertheless, the court below held that the Eleventh Amendment barred reimbursement of the money unconstitutionally taken from the Petitioners. The questions presented for review are:

1. A statute requiring the payment of tuition to a state university, having been held unconstitutional, does the Eleventh Amendment forbid a federal court from ordering the students reimbursed, or is the Eleventh Amendment superseded in this case by the Fourteenth Amendment?

2. Is a state-related university, which has a corporate existence, administrative powers, and revenue-raising capabilities separate and apart from the state, the alter ego of the state for Eleventh Amendment purposes?

3. Are officials of a state-related university personally liable for reimbursement of tuition and fees collected under protest from alien students in violation of the Fourteenth Amendment?

Constitutional And Statutory Provisions Involved

Amendment XI, United States Constitution:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

Amendment XIV, United States Constitution:

> Section 1. . . . [N]or shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement Of The Case

Reverend W. L. Jagnandan and his sons Edward and Leonard, the Petitioners, were citizens of the Republic of Guyana lawfully admitted to this country as permanent resident

aliens when they moved to West Point, Mississippi, in September of 1969. The brothers enrolled as full-time students at nearby Mississippi State University (MSU) during the fall semester of 1970. Two years later, Reverend Jagnandan entered that institution as a special student.

At the time Edward and Leonard enrolled at MSU, Reverend Jagnandan attempted to establish his family's eligibility to be considered residents of Mississippi for tuition purposes. The Respondent MSU officials, however, required the Jagnandans to pay out-of-state tuition pursuant to Miss. Code Ann. §37-103-23 (1972), which classified all aliens as non-residents for the assessment of tuition at state-related institutions of higher learning. After exhausting their administrative remedies, the Jagnandans challenged the validity of that statute in a suit commenced in the United States District Court for the Northern District of Mississippi on January 19, 1973. Jurisdiction was predicated on 28 U.S.C. §1343.

The statutory three-judge court declared that the alien tuition statute violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and enjoined its further enforcement. No appeal was taken from that portion of the district court's judgement.

However, the court refused to award the Jagnandans reimbursement for the $3,495 in tuition and fees which it found had been unconstitutionally exacted from them. Such relief,

the court held, was barred by the Eleventh Amendment as interpreted in Edelman v. Jordan, 415 U.S. 651 (1974). The Court of Appeals affirmed the denial of monetary relief.

Reasons For Granting The Writ

For almost seventy years, the question whether a state's Eleventh Amendment immunity from suit in a federal court was limited by the subsequent adoption of the Fourteenth Amendment has evaded a definitive answer by this Court.[1/] This case clearly presents that

1/ The question was first squarely raised, but left unanswered, in Ex Parte Young, 209 U.S. 123, 150 (1908):

> We think that, whatever the rights of the complainants may be, they are largely founded upon the [Fourteenth] Amendment, but a decision in this case does not require an examination or decision of the question whether its adoption in any altered or limited the effect of the earlier [Eleventh] Amendment.

Resolution of that issue was avoided, of course, by the legal fiction that an order enjoining a state official from enforcing an unconstitutional statute could be entered against the officer in his individual capacity without operating as a restraint upon the sovereign.

More recently, the question lurked in the background, but was not reached, in Edelman v. Jordan, 415 U.S. 651 (1974), and Fitzpatrick v. Bitzer, ___ U.S. ___, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). See discussion, pp. 11-12, infra.

issue for review.

The Civil War Amendments were intended "to serve as a sword, not merely as a shield, for those whom they were designed to protect." Edelman v. Jordan, 415 U.S. 651, 664 (1974). The Jagnandans, however, have thus far found the cutting edge of the Fourteenth Amendment too blunt to pierce the Eleventh Amendment defense of the Mississippi State University officials who deprived them of their property without the due process of the law and denied them the equal protection of the laws. The import of the Fifth Circuit's holding in this case was clearly articulated by Judge Goldberg in his concurring opinion:

> [T]he policies embodied in the fourteenth amendment's protection of individual rights against the state must be substantially frustrated [because] the eleventh amendment is read to provide immunity for the states in regard to any recovery of wrongfully taken money.

App., infra, p. 60a.

Whether a federal court, in the absence of a clear waiver of sovereign immunity or explicit Congressional authorization, is powerless to fully vindicate individual rights safeguarded against state infringement by the Fourteenth Amendment is a question of paramount importance implicating fundamental principles of federalism and touching upon the very essence of civil liberty. It is an issue

which should now be finally resolved by this Court.

Indeed, both Chief Judge Brown and Judge Goldberg, realizing that the Fifth Circuit's resolution of this serious issue rested precariously upon dicta, sounded a note of "earnest solicitation" to this Court to authoritatively decide the question. App., infra, pp. 57a, 94a. Judge Roney, the third member of the panel, implicitly sought "further direction" from this Court when he suggested it might review the questions raised in this litigation in conjunction with similar problems posed on appeal in Rabinovitch v. Nyquist, No. 75-1809.[2/] App., infra, pp. 54a-56a.

2/ Reported below as Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976), Rabinovitch involves a claim for scholarships and loans withheld from an alien student by the New York State Higher Education Services Corporation (NYSHESC) because he refused to apply for United States citizenship. The case at bar, on the other hand, seeks the return of money unconstitutionally taken from the Jagnandans, and thus presents a factual pattern and corresponding legal issues beyond those raised in Rabinovitch.

This Court has noted probable jurisdiction in NYSHESC's cross-appeal from the determination that New York's citizenship-intent requirement for financial aid is unconstitutional.

In concluding that the Fourteenth Amendment does not operate as a self-executing limitation on the state's Eleventh Amendment sovereign immunity,[3] the Fifth Circuit

Nyquist v. Mauclet, 45 U.S.L.W. 3321 (Nov. 2, 1976) (No. 76-208). Should this Court reverse on that issue, the Eleventh Amendment problem in that case will, of course, be moot.

3/ As a preliminary matter, the court below held that any monetary award would come from the university, not the individual defendants, and that the university was the alter ego of the state for Eleventh Amendment purposes. The Petitioners believe the Fifth Circuit erroneously decided these critical threshold issues, and will so argue should certiorari be granted.

The Fifth Circuit also flatly stated there was no Congressional enforcement legislation enacted pursuant to Section 5 of the Fourteenth Amendment involved in this case. App., infra, p. 53a. It did not address the issue of whether a state is a "person" within the meaning of 42 U.S.C. §1983. Although it is well established that local governmental units are not subject to suit under that section, Monroe v. Pape, 365 U.S. 167 (1961); Moor v. County of Alemeda, 411 U.S. 693 (1973), the reasoning of those cases does not compel a similar result as to the state itself. This important issue also deserves careful review by this Court.

relied primarily on implications emanating from this Court's treatment of a series of welfare cases in Edelman v. Jordan, 415 U.S. 651 (1974) and its emphasis upon the threshold fact of Congressional enabling legislation enacted pursuant to Section 5 of the Fourteenth Amendment in Fitzpatrick v. Bitzer, ___ U.S. ___, 96 S.Ct. 2666, 49 L.Ed2d 614 (1976).

In Edelman, this Court expressly disavowed a number of cases 4/ in which it had earlier -- but sub silentio -- approved awards of retroactive welfare benefits insofar as those cases conflicted with its in-depth analysis of the Eleventh Amendment. 415 U.S. at 670-671 and n. 13. Although several of those cases involved Fourteenth Amendment violation, this Court's opinion reflected no indication that it focused on that fact -- or was conscious of their potential distinguishability -- when it questioned their vitality. That portion of Edelman, therefore, hardly provides support for the proposition that the Eleventh Amendment closes the door of Fourteenth Amendment cases which

4/ Shapiro v. Thompson, 394 U.S. 618 (1969); State Dept. of Health and Rehabilitative Services v. Zarate, 407 U.S. 918 (1972); Sterret v. Mother's and Children's Rights Organization, 409 U.S. 809 (1972); Wyman v. Bowens, 397 U.S. 49 (1969)

seek monetary relief against the state.[5] That is particularly true in light of the reappraisal of the welfare cases in Edelman itself, which underscores the danger of drawing conclusions about important constitutional issues which have not been orally argued before this Court or expressly discussed by it in its opinions.

For the same reasons, Fitzpatrick does not resolve the question whether the Fourteenth Amendment operates as a self-executing limitation on the state's constitutional immunity from suit in a federal forum. That case held the Eleventh Amendment must yield in a private cause of action against a state expressly authorized by Congress pursuant to its enforcement powers under Section 5 of the Fourteenth Amendment. Since the threshold fact of Congressional legislation was found in Fitzpatrick, this Court had no occasion to determine whether the Fourteenth Amendment, of its own force, restricts the scope of the Eleventh.

5/ Mr. Justice Marshall, in fact, expressly noted in Edelman that this Court's decision in that case did not resolve the issues raised here. 415 U.S. at 690 n.2 (Marshall, J., dissenting).

Thus, as Judge Goldberg emphasized below, "it is open for . . . [this] Court to reverse our holding today without overruling any of its prior cases." App., infra, p. 93a. In fact, in his concurring opinion in which Chief Judge Brown joined, he invited this Court to do precisely that, indicating he would have found the state's Eleventh Amendment immunity limited to the extent necessary to fully effectuate the purposes of the Fourteenth had he not felt constrained by the countervailing indications emanating from this Court discussed above.[6]

Whether, in the circumstances of this case, the Eleventh Amendment renders a federal court impotent to vindicate individual rights safeguarded from state encroachment by the Fourteenth Amendment is a question of fundamental importance to our system of government. "The very essence of civil liberty," Chief Justice Marshall wrote, 'certainly consists in the right of every individual to claim the protection of the laws, whenever he receives

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6/ In reaching that conclusion, Judge Goldberg found the legislative history of the Fourteenth Amendment persuasive. This Court has never fully examined and discussed those materials in the context of the issues raised in this case, although some of the history was set out in the amicus brief of the NAACP Legal Defense Fund in Edelman.

an injury." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164 (1803). Sovereign immunity, when it operates to preclude a judicial remedy for the infringement of a legal right, runs counter to this notion of reason and justice.

The Jagnandans were deprived of almost $3500 in violation of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Yet because of the Eleventh Amendment, the Fifth Circuit reluctantly ruled it could not do justice between the parties.

The framers of the Reconstruction Amendments surely did not contemplate that a federal court would be powerless to fully enforce the panoply of individual rights embodied in those provisions because of a plea of sovereign immunity. A bloody civil war, after all, had just been fought to reaffirm the supremacy of those rights and liberties over the sovereignty of the states.

Whether or not the Fifth Circuit correctly predicted how this Court may ultimately resolve the inconsistency between the Eleventh and Fourteenth Amendments when the two come into irreconciliable conflict, this "most important issue certainly merits direct and definitive Supreme Court attention." App., infra, p. 94a.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgement and opinion of the Fifth Circuit.

Respectfully submitted,

Mark Shenfield
Urban Law Institute of the
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009
202-265-9500

Patrick O'Rourke
American Civil Liberties
Union of Mississippi
520 N. President Street
Jackson, Mississippi
39201
601-355-7495

Attorneys for Petitioners

Of Counsel:

Melvin L. Wulf
American Civil Liberties Union Foundation
22 East 40th Street
New York City, New York 10016

APPENDIX A

No. 74-3467
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

EDWARD R. JAGNANDAN et al.,
Plaintiffs,

v.

WILLIAM L. GILES et al.,
Defendants.

Sept. 20, 1976.

Before Brown, Chief Judge, and Goldberg and Roney, Circuit Judges.

Roney, Circuit Judge:

Plaintiff Reverend W.L. Jagnandan, on behalf of himself and his two sons, brought a class action to challenge the constitutionality of a Mississippi statute which classified all alien students, even Mississippi residents, as non-residents for tuition and fee purposes at state institutions of higher learning. A three-judge district court denied the class action request, declared the statute unconstitutional as being in contravention of the equal protection and due process clauses of the Fourteenth Amendment,

and granted injunctive relief. The court refused, however, to award plaintiffs reimbursement for the $3,495.00 in tuition and fees they had paid in excess of the amounts required of resident students, holding that such relief is barred by the Eleventh Amendment, as interpreted by the Supreme Court in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974). Jagnandan v. Giles, 379 F.Supp. 1178 (N.D. Miss. 1974). Plaintiffs appeal the denial of reimbursement for the excess tuition and fees paid pursuant to the unconstitutional statute. Plaintiffs do not appeal the denial of their class action request, nor do the defendants appeal from the grant of declaratory and injunctive relief as to the statute's unconstitutionality.

This appeal presents important questions involving (1) the scope of our jurisdiction to review decisions of three-judge district courts, and (2) the scope of the Eleventh Amendment's prohibition against reimbursement of overpayments collected under an unconstitutional statute. As to the first question, we conclude that we do have jurisdiction to hear the appeal. On the merits, we hold that the Eleventh Amendment bars suits in federal court to recover excess tuition paid pursuant to an unconstitutional statute, and affirm the three-judge district court.

The Jagnandans were citizens of the Republic of Guyana (formerly British Guiana in South America) lawfully admitted into this country

as aliens with permanent resident classifications.1/ Since September, 1969 they have lived in West Point, Mississippi, where Reverend Jagnandan is a minister of a local church. Reverend Jagnandan pays Mississippi income taxes and owns an automobile registered in Mississippi. All three plaintiffs hold Mississippi driver's licenses. Each testified without reservation or qualification that he had no present intention of leaving the state, his purpose being to reside indefinitely in Mississippi.

The two sons, Edward R. Jagnandan and Leonard Susil Jagnandan, enrolled as full time students at Mississippi State University in the fall of 1970. Reverend Jagnandan himself enrolled at the University in the spring of 1972 as a candidate for a master's degree. The three were required to pay nonresident tuition and fees pursuant to a Mississippi statute classifying all aliens as nonresidents for tuition and fee purposes at state institutions of

1/ At oral argument counsel for plaintiffs informed the Court that subsequent to the filing of this appeal the Jagnandans have been naturalized as United States citizens. It is interesting to note that the guest speaker at the naturalization ceremony was Dr. William L. Giles, President of Mississippi State University, one of the defendants in this case.

higher learning.2/

In September 1970, contemporaneous with his sons' matriculations at Mississippi State, Reverend Jagnandan sought to establish with University officials his family's eligibility as state residents for tuition and fee purposes. Plaintiffs fully exhausted their opportunity for administrative relief and, upon being notified that they were ineligible for resident tuition rates, instituted this federal action.

JURISDICTION

Congress has provided that suits seeking injunctive relief against the enforcement of state statutes by state officers must be heard and determined in the first instance by a specifically constituted district court of three judges, at least one of whom must be a circuit judge. 28 U.S.C.A. § 2281. Appeals lie directly to the Supreme Court from orders of three-judge courts "granting or denying, . . . an interlocutory or permanent injunction. . ."

2/ Miss. Code Ann. § 37-103-23 (1972), formerly designated as Miss. Code § 6800-11 (11) (1942). At all pertinent times, the general fees and tuition charges were separately established for resident and nonresident students, a higher rate ($300 more per semester) being required of nonresidents.

28 U.S.C.A. § 1253.3/ Courts of appeals have jurisdiction over all appeals excepting those where direct review may be had in the Supreme Court. 28 U.S.C.A. §§ 1291 and 1292 (a) (1).

Although this statutory scheme is simple enough to describe, it has proved to be far from simple in its operation and has "given rise to bewildering problems in the area of appellate review." 9 J. Moore, Federal Practice Paragraph 110.03 [3], at 70 (2d ed. 1975). Professor Wright has observed that the appellate rules relating to three-judge courts "are so complex as to be virtually beyond belief." C. Wright, Handbook of the Law of Federal Courts § 50, at 193 (2d ed. 1970). The Supreme Court itself has recognized that "[t]hese procedural statutes are very awkwardly drafted, and in struggling to make workable sense of them, the Court has not infrequently been induced to retrace its steps." Gonzalez v. Automatic Employees Credit Union, 419 U.S.

3/ 28 U.S.C.A. § 1253 provides:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

90, 95, 95 S.Ct. 289, 293, 42 L.Ed.2d 249 (1974) (footnotes omitted). This Court also has commented on the problems which arise when working in this area, noting that "the jurisdiction of three-judge courts and appellate jurisdiction arising from their decisions is a treacherous and fluid area of our jurisprudence." Wernick v. Mathews, 524 F.2d 543, 545 (5th Cir. 1975).

Last term the Supreme Court attempted to clarify the law in this confused area. In two cases, Gonzalez v. Automatic Employees Credit Union, supra, 419 U.S. 90, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974), and MTM, Inc. v. Baxley, 420 U.S. 799, 95 S.Ct. 1278, 43 L.Ed.2d 636 (1975), the Court restricted the scope of Supreme Court appellate jurisdiction under 28 U.S.C.A. § 1253 to situations involving denial of injunctions.

In Gonzalez, the Court unanimously held that jurisdiction over an appeal from an order of a three-judge court dismissing a complaint for lack of standing was vested in the courts of appeals. Although the Court explored the question of whether an order of a three-judge court "denies" an injunction, for purposes of 28 U.S.C.A. § 1253, where there is no adverse resolution of the constitutional claims presented, it reserved determination of that issue and rested its decision on a different ground. The decision was based, at least partially, on the reasoning that a three-judge

court is not required and should not be convened when the district court lacked jurisdiction of the complaint or when the claim is not justifiably in the federal court. 419 U.S. at 100, 95 S.Ct. 289 citing Ex parte Poresky, 290 U.S. 30, 31, 54 S.Ct. 3, 78 L.Ed. 152 (1933). The Court noted that if a single judge had in fact issued the order of dismissal for lack of standing, no direct appeal to the Supreme Court would have been allowed.4/ Thus, it was "mere convenience or happenstance" that a three-judge court had ruled on the standing issue, and to avoid a fortuitous direct appeal, the Court held

> that when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court ab initio, review of the denial is available only in the court of appeals.

Gonzalez v. Automatic Employees Credit Union, supra, 419 U.S. at 101, 95 S.Ct. at 296.

Three months later, in MTM, Inc. v. Baxley, supra, 420 U.S. 799, 95 S.Ct. 1278, 43 L.Ed.2d 636 (1975), the Court again considered the reach of its jurisdiction under § 1253. Directly addressing the question it reserved in

4/ See Ex parte Metropolitan Water Co., 220 U.S. 539, 31 S.Ct. 600, 55 L.Ed. 575 (1911).

Gonzalez, the Court, with Justice White concurring only in the result and Justice Douglas dissenting, held that direct appeal lies from a three-judge court order denying injunctive relief only when the order is based on the merits of the constitutional attack against the statute. Therefore, since in MTM, Inc. the three-judge court had dismissed the suit under the comity doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and did not reach the merits of the case, the Court ruled that it lacked jurisdiction over the direct appeal.

Although in each case the Supreme Court's decision was meant to limit its review under § 1253, the practical effect of the two cases may differ in particular situations.

> Under Gonzalez, the question of Supreme Court appealability turns on the power possessed by a single district judge. If a three-judge court denies an injunction on a ground within the decisional province of a single judge, review of the three-judge denial must be in the court of appeals. By contrast, MTM focuses on whether the three-judge court's denial of an injunction was grounded in a decision on the constitutional merits.

The Supreme Court: 1974 Term, 89 Harv. L. Rev. 1, 187 (1975). These differing approaches raise the question of whether MTM, Inc. supplements Gonzalez, or subsumes it.

These two decisions undoubtedly will serve in most cases to make more certain the proper forum in which an appeal of an order of a three-judge court should be taken. In this particular case, however, we are unsure as to whether jurisdiction of the appeal lies in this Court or in the Supreme Court. Under the Gonzalez standard it would appear that we properly have jurisdiction of the case, since the appealed order denying reimbursement does not involve a question of injunctive relief and thus is not one which had to be made by a three-judge court. It can be argued, however, that the question of reimbursement was so integrally related to the question of constitutionality which confronted the three-judge court, that its appealability must be considered as from an issue "within the decisional province" of a three-judge court.

Applying the MTM, Inc. test presents similar difficulties. It is clear that the order denying reimbursement was not based on a resolution of the merits of the constitutional claim for which injunctive relief was sought. Again, however, a plausible argument can be made that in this case the reimbursement issue is so closely related to the question of the constitutionality of the statute that the appeal of the order denying reimbursement should be heard by the same forum that would hear an appeal involving the constitutionality of the statute.

Moreover, had the state officials appealed the three-judge court's grant of injunctive

relief, we would confront even greater conceptual problems. Such a situation would present the hypothetical suggested by Justice Douglas in his dissent in MTM, Inc., whereby under a strict reading of the new standards, a case could be fragmented or split into pieces for purposes of appeal. 420 U.S. at 807, 95 S. Ct. 1278. The order granting the injunction would be appealed directly to the Supreme Court, while the same order denying reimbursement for excess past tutition and fees paid pursuant to the unconstitutional statute would be appealed to this Court.

The absence of an appeal from the injunctive relief eliminates that hypothetical from surfacing here. Our reading of both Gonzalez and MTM, Inc. leads us to believe that in this case the proper forum for appeal is in this Court, regardless of where appellate jurisdiction may lie in a case where the grant or denial of injunctive relief has also been appealed. By holding that we have jurisdiction to hear the appeal, we are supporting "the historic congressional policy of minimizing the mandatory docket of . . . [the Supreme Court] in the interest of sound judicial administration." MTM, Inc. v. Baxley, supra, 420 U.S. at 804, 95 S. Ct. at 1281.5/ Furthermore, by hearing this appeal we are giving the Supreme Court our

5/ Accord, Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 98, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974).

opinion on the proper determination of the merits of the case, views which would not be available to that Court if only a direct appeal were available. See Gonzalez v. Automatic Employees Credit Union, supra, 419 U.S. at 99, 95 S.Ct. 289.

In short, based upon the recent Supreme Court decisions in Gonzalez and MTM, Inc., and in the interest of sound judicial administration, we hold that jurisdiction over this appeal properly lies in this Court.6/

ELEVENTH AMENDMENT

The Mississippi statute requiring resident aliens residing in Mississippi to pay out-of-state tuition was ruled unconstitutional by the three-judge district court. Jagnandan v. Giles, 379 F.Supp. 1178 (N.D. Miss. 1974). No appeal was taken from that holding. The court held, however, that the Eleventh Amendment bars plaintiffs' recovery of excess tuition payments made under the unconstitutional statute. In denying reimbursement the court relied on Edelman v. Jordan, supra, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), and on Edelman's precursor, Ford Motor Co. v.

6/ Cf. Butler v. Dexter, ___ U.S. ___, 96 S.Ct. 1527, 47 L.Ed.2d 774 (1976) (per curiam).

Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945). 7/ This denial of relief is challenged on appeal.

In presenting their case for reversal plaintiffs assert five arguments: (1) defendants are personally liable for the excess tuition payments; (2) the State of Mississippi is not a party to this suit for Eleventh Amendment purposes; (3) Mississippi waived its immunity; (4) Edelman v. Jordan does not preclude the type of relief here sought; and (5) the Eleventh Amendment cannot be used to protect Fourteenth Amendment violations. Answering these points seriatim in the negative, we affirm the district court's denial of tuition refunds.

During the ratification process of the United States Constitution, and subsequent thereto, the sovereign states of this fledgling nation were concerned with the prospect that federal constitutional authority might be construed to allow suits against the states in federal courts when brought by a citizen of another state or foreign country. 8/ These fears were soon

7/ See generally Note, Edelman v. Jordan: The Case of the Vanishing Retroactive Benefit and the Reappearing Defense of Sovereign Immunity, 12 Hous. L.Rev. 891 (1975).

8/ See Principality of Monaco v. Mississippi, 292 U.S. 313, 321-325, 54 S.Ct. 745, 78 L.Ed. 1282 (1934); Hans v. Louisiana, 134 U.S. 1, 12-15, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

realized in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793). Chisholm held that under the language of the Constitution and of the Judiciary Act of 1789 a state could be sued by a citizen of another state or foreign country. Reaction was swift and immediate. Barely five years later, in 1798, the Eleventh Amendment was ratified by the states. 9/ Unaltered since its ratification, the amendment provides simply:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

The amendment has been judicially construed to bar federal jurisdiction over suits brought against a state by its own citizens, depite the absence of language to that effect. 10 /

9/ See C. Jacobs, The Eleventh Amendment and Sovereign Immunity, 64-75 (1972).

10 / Employees v. Department of Pub. Health & Welfare of Mo., 411 U.S. 279, 280, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973); Parden v. Terminal Ry., 377 U.S. 184, 186, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964); Hans v. Louisiana, supra 134 U.S. at 14-15, 10 S.Ct. 504.

It also has been construed to encompass a suit brought by a foreign state.11/ This bar, however, does not preclude a suit against the state when brought by the United States.12/ Thus, when speaking of the Eleventh Amendment, the Court really talks in terms of the jurisdiction of federal courts to entertain suits and to grant relief against a state.13/

Personal Liability

At the outset we hold that the defendant University officials are not personally liable for the excess tuition payments tendered by plaintiffs. Thus, if plaintiffs are to recover, payment must come from defendants in their official capacity.

There is nothing in the record to indicate that defendants acted unreasonably or in a

11/ Principality of Monaco v. Mississippi, supra, 292 U.S. at 330-332, 54 S.Ct. 745.

12/ United States v. Mississippi, 380 U.S. 128, 140, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965).

13/ See Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 467, 65 S.Ct. 347, 89 L.Ed. 389 (1945); 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3254, at 79-80 (1975).

manner outside of their official capacity.14/ Defendants were merely complying with the clear state mandate in collecting out-of-state tuition from these resident aliens. Defendants were not on notice of the statute's unconstitutionality prior to payment and acceptance of the money. They were acting in complete good faith.15/

Suit Against the State?

Plaintiffs next urge that for Eleventh Amendment purposes the defendants are not state entities and therefore the Eleventh Amendment is inapplicable. The initial defendants were the President of Mississippi State University and the Assistant to the Vice President for Business Affairs at the University. The district court, on its own motion, joined the Board of Trustees as a party defendant. 379 F.Supp. at 1180. See Fed.R.Civ.P. 19(a). We cannot agree with plaintiffs' contention, because on our reading of the case law we are convinced

14/ See Poindexter v. Greenhow, 114 U.S. 270, 288-290, 5 S.Ct. 903, 29 L.Ed. 185 (1885) (Virginia Coupon Cases). Cf. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Sapp v. Renfroe, 511 F.2d 172 (5th Cir. 1975).

15/ Cf. Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

that, effectively, the state is the true defendant to this suit.

By its own language the Eleventh Amendment indicates that a state must be sued before the bar to suit in federal court applies. The state must be a real or, at least, a nominal defendant.16/ It is not necessary for the state to be actually named in the suit. It is enough that, in effect, the suit is against the state and any recovery will come from the state.17/

To make this determination, the Court must

16/ Lincoln County v. Luning, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824).

17/ Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 576-577, 66 S.Ct. 745, 90 L.Ed. 862 (1946); Ford Motor Co. v. Department of Treasury, supra, 323 U.S. at 464, 65 S.Ct. 347; Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 50-51, 64 S.Ct. 873, 88 L.Ed. 1121 (1944). See Worcester County Trust Co. v. Riley, 302 U.S. 292, 296-298, 58 S.Ct. 185, 82 L.Ed. 268 (1937); Ex parte The State of New York, 256, U.S. 490, 500-503, 41 S.Ct. 588, 65 L.Ed. 1057 (1921).

decide whether the suit is for all practical purposes against the state.18/ In Hander v. San Jacinto Jr. College, 519 F.2d 273 (5th Cir.), reh. denied, 522 F.2d 204 (5th Cir. 1975), this Court affirmed the district court's award of back pay for a wrongfully discharged teacher. The Court recognized that a back pay award was the type of retroactive relief prohibited by Edelman v. Jordan, supra, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).19/ Nonetheless, an Eleventh Amendment challenge was bypassed in the suit against the governing junior college districts on the ground that under the peculiar Texas statutory and decisional law, the suit was not against the state.20/ The

18/ Aerojet-General Corp. v. Askew, 453 F.2d 819, 828-829 (5th Cir. 1971), cert. denied, 409 U.S. 892, 93 S.Ct. 110, 34 L.Ed.2d 149 (1972). See Ex parte The State of New York, supra, 256 U.S. at 500, 41 S.Ct. at 590 ("[T]he question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.").

19/ See Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir.) cert. granted, ___ U.S. ___, 96 S.Ct. 2666, 49 L.Ed.2d __ (1975).

20/ See Adams v. Rankin County Bd. of Educ., 524 F.2d 928, 929 (5th Cir. 1975), cert. filed, 44 U.S.L.W. 3686 (U.S. June 1, 1976) (No. 75-1710) (county school system in Mississippi).

junior college districts in San Jacinto were "primarily local institutions, created by local authority and supported largely by local revenues." 519 F.2d at 278. Thus, under the established law that local governmental institutions may not stand in the same light as the state for Eleventh Amendment purposes, there was no bar to the suit.21/ What preserved jurisdiction in San Jacinto will not, however, assist the plaintiffs here. Under the instant facts, it is clear from statutory and decisional law that the State of Mississippi is the real party defendant.22/ The district court implicitly recognized this when it stated,

> Nor is there any question but that the refunds, if ordered, would not be paid by the defendents from personal funds, but would necessarily be a charge upon the state treasury, or at least that portion of the fisc dedicated to higher education.

379 F.Supp. at 1188

The genesis of Mississippi State University

21/ See Edelman v. Jordan, supra, 415 U.S. at 667 n.12, 94 S.Ct. 1347; Lincoln County v. Luning, supra, 133 U.S. at 529, 10 S.Ct. 363 (1890); Young v. Hutchins, 383 F.Supp. 1167, 1179-1180 n.19 (M.D. Fla. 1974).

22/ Accord, Hamilton Mfg. Co. v. Trustees of the State Colleges in Colo., 356 F. 2d 599 (10th Cir. 1966), for a similar result.

(M.S.U.) is found in Chapter XIX of the Laws of the State of Mississippi, approved February 28, 1878. The school was first known as the Agricultural and Mechanical College of the State of Mississippi. Laws of Mississippi, ch. XIX, § 2.23/ Overseeing the school was a Board of Trustees appointed by the Governor with the advice and consent of the state senate. Id. § 3. The Board was declared to be a body politic and corporate, capable of suing and being sued. Id. § 5. The Governor was the ex officio president. Id. § 6. The State Treasurer was the ex officio treasurer, empowered to keep and disburse all moneys of the school according to the orders of the Board. Id. § 8. Later, Mississippi's universities were placed under the control of the Board of Trustees of state institutions of higher learning.24/ The Agricultural and Mechanical College of Mississippi logo was changed to Mississippi State University by statute, although the school retained "all its property and the franchises, rights, powers, and privileges heretofore conferred on it by law [1878 Act] . . . ." Miss. Code Ann. § 37-113-3 (1972).

Under state law Mississippi is inextricably involved in all facets of the Board's operation of the University, as well as the operation of other schools comprising the state's higher institutions of education. See Miss. Code Ann. § 37-101-1 (1972). The Board's structure

23/ See Miss. Code Ann. § 37-113-3 (1972)

24/ See Miss. Code Ann. § 6718 et seq. (1942)

is detailed in the Mississippi Constitution. In part, the provision provides:

> Such Board shall have the power and authority to elect the heads of the various institutions of higher learning, and contract with all deans, professors and other members of the teaching staff, and all administrative employees of said institutions for a term not exceeding four years; but said Board shall have the power and authority to terminate any such contract at any time for malfeasance, inefficiency or contumacious conduct, but never for political reasons.
>
> Nothing herein contained shall in any way limit or take away the power of the Legislature had and possessed, if any, at the time of the adoption of this amendment, to consolidate or abolish any of the above named institutions.

Miss. Const. Art. 8, § 213-A. The general powers and duties of the Board are prescribed in § 37-101-15 of the Mississippi statutes. The Board exercises control, distribution and disbursement "of all funds, appropriations and taxes, . . . levied and collected, received, or appropriated . . . ." Miss. Code Ann. § 37-101-15(a) (1972). It also has the power to authorize employees to sign vouchers for the disbursement of funds. According to documentations provided in a post argument memorandum submitted by defendants' counsel, M.S.U. is classified as a Group I university. This means

that the University is allowed to request up to 72% of its total budget from state appropriations. Requests for such funds are made through the Board as the clearing house for legislative appropriations. The Board disburses the funds to the state university system by an allocation-of-funds formula. Thus, it appears that all appropriations must first be funnelled through the Board. The Board's supervision over the University's budget is complemented by the state's control over the Board's supervision.

Section 37-101-15(d) provides that the Board shall maintain a uniform system of recording and accounting. This system must be approved by the state Department of Audit. It prepares an annual report submitted to the legislature that details "the disbursements of all moneys appropriated to the respective institutions." Id. § 37-101-15(e). The report must also show a summary of gross receipts and disbursements. This necessarily covers not only the funds appropriated by the legislature, but would also include self-generating funds. These funds include all student fees collected, grants, sponsored research, income from endowment interest that may accrue to an institution, and the like. Important to note is a provision that illustrates both the Board's control over M.S.U.'s fiscal policy and the ultimate supervision of the Board by the state legislature.

> The board shall keep the annual expenditures of each institution herein mentioned

> within the income derived from legislative appropriations and other sources, but in case of emergency arising from acts of providence, epidemics, fire or storm with the written approval of the governor and by written consent of a majority of the senators and of the representatives it may exceed the income.

Id. § 37-101-15(e) (emphasis added).

Related to this is another statutory provision detailing the procedure by which the Board submits the budget of each institution to the state's Commission of Budget and Accounting. Section 27-103-29(g) directs the Board to submit the annual budget prior to the beginning of each fiscal year. The Commission approves the budget if sufficient funds will be available to meet the requests. If not, requests must be justified to the Commission or some sort of compromise worked out. Only then is the budget approved. "The total amount approved for each institution shall constitute the maximum funds which may be expended during the fiscal year." Miss. Code Ann. § 27-103-29(g).

This statutory scheme clearly demonstrates the State of Mississippi's control over the fiscal policies established by the Board, and a fortiori over the finances of M.S.U. There has not been cited and we have not discovered any state statute providing refund procedures for overpayment of out-of-state tuition fees. Cf.

Miss. Code Ann. § 27-73-1 et seq. (tax refund statutes).

Thus, there are no facts in this case that would allow application of the San Jacinto rationale. Mississippi statutes do provide that counties meeting certain qualifications are authorized to contribute funds toward the construction and equipping of M.S.U. educational facilities within that county. Miss. Code Ann. § 37-113-43 (1972). These funds, however, do not give the county any rights to the facilities, id. § 37-113-49, and the funds are deposited into a special fund in the state treasury. Id. § 37-113-47.

State decisional law confirms that the Board and the University are part and parcel of the state. Coleman v. Whipple, 191 Miss. 287, 2 So. 2d 566 (1941), involved a suit to construe a will and cancel certain bequests to three Mississippi universities. In determining whether the state fell within the statute prohibiting charitable bequests, the court had to inquire whether the universities were one and the same with the state. In discussing the nature of the Board, the court stated:

> They were the managing board or head of the university, and then and now constitute the University of Mississippi, created by the State through its legislature which, under its act of creation (Sec. 5) retains the right to repeal the entire act; its property is owned

> by the State and the university is as an arm of the State, the State itself.

This is also true for M.S.U.

> The acts creating the colleges now known as Mississippi State College [renamed Mississippi State University] (February 28, 1878) . . . must be similarly construed, and such construction is not at all affected by Chapter 127 of the Laws of 1932, creating a single board of trustees for all the state institutions of higher learning.

2 So.2d at 567 (emphasis added).

In Smith v. Doehler Metal Furniture Co., 195 Miss. 538, 15 So.2d 421 (1943), Mississippi Southern College was joined as a party defendant in a suit to recover a debt. The president of the college and its financial secretary were also defendants, a situation similar to the case at bar. The court seemed to recognize that the Board of Trustees would not have to answer suits absent express waiver of its immunity as a state agency. 15 So.2d at 421-422. Plaintiffs sought payment from a separate fund, "Mississippi Southern College Student Fund," which contained student fees paid over the preceeding two to three years. Despite this, the court stated that the funds were public, not private. Once collected by the college officers, officials such as defendants in the case sub judice, the moneys became public funds "as to which the

officers were responsible solely to the college and to the trustees, and to no private person whomsoever." 15 So.2d at 422. Thus, in Smith the fees were not subject to attachment. The same principle must apply a fortiori in the instant case where there was no separate fund for student fees.

The Eleventh Amendment was fashioned to protect against federal judgments requiring payment of money that would interfere with the state's fiscal autonomy and thus its political sovereignty. Retroactive monetary relief for the constitutional violations here would have just that effect. 25/ Mississippi has devised a complex statutory design which governs the state's schools of higher education and their control by the Board of Trustees. The Board is required to submit budgetary proposals for legislative acceptance. To require refund payments from the Board for overpayment of tuition fees would be the kind of tampering the Eleventh Amendment sought to avoid.

These fees appear to have been commingled with all moneys held by the University. 26/ Moreover, these types of fees were factored

25/ See generally Note, Attorneys' Fees and the Eleventh Amendment, 88 Harv. L. Rev. 1875, 1877-1882 (1975).

26/ Cf. Schiff v. Williams, 519 F.2d 257, 262 (5th Cir. 1975) (fees held in separate fund said to be private moneys and not property of the State of Florida).

into the preparation of the annual budget for M.S.U. and were relied upon by the state legislature in determining the maximum amount of expenditures allowed. To compel payment would be to add an expenditure not figured in the budget. The fact that the sum is small, $3,495.00, compared to the overall University budget does not affect the determination. The Eleventh Amendment bar is not contingent on the magnitude of the monetary award sought against the state.27/

Waiver of Immunity

On oral argument plaintiffs urged that this case is indistinguishable from Soni v. Board of Trustees of the Univ. of Tenn., 513 F.2d 347 (6th Cir. 1975), cert. denied, U.S. , 96 S.Ct. 2623, 49 L.Ed.2d 372 (1976). In Soni, the Sixth Circuit awarded back pay to a University professor in the face of Eleventh Amendment contentions. Although the Soni record was incomplete on the issue of the University's identity as a state instrumentality, the court assumed without deciding that a suit against the University was a suit against the State of Tennessee. The court went on to hold, however, that there had been a waiver of federal court immunity based upon the University's charter, which read:

27/ Cf. Note, Attorneys' Fees and the Eleventh Amendment, 88 Harv.L.Rev. 1875, 1881-1882 (1975).

> The said trustees and their successors by the name aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere. (emphasis added).

513 F.2d at 351. The Soni court found this to be a clear waiver of Tennessee's right not to be sued in federal court.

The principles guiding our determination on this issue are well settled. Waiver of the state's constitutional immunity must appear clearly and will not be easily implied.28/ An immunity waived for state suit purposes does not necessarily waive immunity for federal courts.29/

There is nothing in the present record to indicate that Mississippi clearly intended to

28/ Edelman v. Jordan, supra, 415 W.S. at 673, 94 S.Ct. 1347; Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959).

29/ Murray v. Wilson Distilling Co., 213 U.S. 151, 172, 29 S.Ct. 458, 53 L.Ed. 742 (1909); Chandler v. Dix, 194 U.S. 590, 591-592, 24 S.Ct. 766, 48 L.Ed. 1129 (1904); Scott v. Board of Supervisors of L.S.U., 336 F.2d 557, 558 (5th Cir. 1964).

waiver its Eleventh Amendment immunity. 30/ The sweeping state statutory language of waiver which controlled Soni is not equalled in this case. Section 5, chapter XIX of the 1878 Act simply provided that the Board could sue and be sued. No reference was made to any specific court. Section 5 provided:

> That each of the board of trustees herein provided for, and their successors in office, be and the same are hereby declared to be a body politic and corporate by their respective names and styles, and shall have a common seal, and each in its own name; shall sue and be sued, contract and be contracted with, and may own, purchase, sell and convey property, both real, personal and mixed. (emphasis added).

This "sue and be sued" terminology has not, however, been carried into the present statutes. There is no equivalent of section 5 in the new statutes. No mention is made of the power to sue or to be sued either in the organizational statutes or in the general powers and duties of the Board. 31/ Under specific circum-

30/ Accord, Hamilton Mfg. Co. v. Trustees of the State Colleges in Colo., supra, 356 F. 2d at 601-602, wherein the Tenth Circuit reached a similar result based on a functionally equivalent Colorado statute.

31/ See Miss. Code Ann. §§ 37-101-3, 37-101-7, 37-101-15 (1972).

stances the Board is allowed to sue or be sued. 32/ In these instances, however, the waiver is limited to a narrowly defined activity. The consent to be sued is not given with such clarity as to amount to a waiver of Eleventh Amendment protection. As the Supreme Court state in Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959):

> [W]here a public instrumentality is created with the right "to sue and be sued" that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal, courts.

Id. at 277, 79 S.Ct. at 787.

In the statutes concerning Mississippi State University, there is no provision comparable to section 5 of the 1878 Act. 33/ Only § 37-113-3

32/ See Miss. Code Ann. §§ 37-101-45 (1972) (personal and corporate lessees leasing land for construction of housing and dormitory facilities by private financing may enforce or protect their rights by suit at law or in equity); 37-101-63 (1972) (nonprofit corporations for purpose of acquiring or constructing facilities for higher education, as established by Board resolution, can sue and be sued and defend suits against it).

33/ See Miss. Code Ann. § 37-113-1 et seq. (1972).

cculd be construed as referring back to any form of consent that may have been present in prior acts. In referring to the 1878 Act, this section states in part:

> [Mississippi State University] shall continue to exist as a body-politic and corporate, ... with all its property and the franchises, rights, powers, and privileges heretofore conferred on it by law, or properly incident to such a body and necessary to accomplish the purpose of its creation[.]

This provision likewise lacks the clarity needed in order to infer the state's consent to be sued. As the Supreme Court has often stated,

> Th[e] cases declare the rule that clear declaration of a State's consent to suit against itself in the federal court on fiscal claims is required.

Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 577, 66 S.Ct. 745, 747, 90 L.Ed. 862 (1946). Clear expression is lacking here.

Our holding that there is no Mississippi statute consenting to suit is buttressed by state decisional law. Smith v. Doehler Metal Furniture Co., supra, 195 Miss. 538, 15 So.2d 421 (1943), involved Mississippi Southern College, a sister school of M.S.U. but subject to the same statutory control and Board supervision.

The state Attorney General argued that the school was an agency of the state and that there was no statutory consent for the suit. The Mississippi Supreme Court agreed.

> That an arm or agency of the state cannot be sued except by express statutory or constitutional authroity has been too long and too well settled to be further debatable now, and this includes, of course, suits under the attachment in chancery statutes. An institution such as this College is entrusted only to men of high character, and they, in turn, are under the supervision of a state-wide board of trustees, selected from among the most reputable citizens of the state. The legislature has evidently considered that such men would be as sensitive to every financial obligation of the institution and as alert to preserve its financial integrity as would any court or jury, and that since the principal field of effort of such an agency is other than business, it should not have its energies diverted by standing attendance upon litigation.

15 So.2d at 421-422. In State v. Sanders, 203 Miss. 475, 35 So.2d 529 (1948), the court was seemingly speaking to the instant situation where recovery of excess tuition payments would necessarily be paid from the state treasury. In Sanders the court stated:

> Thus it will be found, . . . that nearly all the cases, wherein the rule of immunity from

> suit against the state, or a subdivision thereof, has been applied and upheld, are those which demanded a money judgment, and wherein the discharge of the judgment, if obtained, would require an appropriation or an expenditure therefrom, which being legislative in its character is a province exclusively of the political departments of the state.

35 So. 2d at 532-533.

This result is identical to a post-Soni decision of the Sixth Circuit in Long v. Richardson, 525 F. 2d 74 (6th Cir. 1975). There former law students sought a money judgment against Memphis State University for out-of-state tuition fees paid while they were in school. The plaintiffs in Long were after the same kind of relief as the Jagnandans. The court held that the suit was barred by the Eleventh Amendment since Tennessee had not clearly waived its immunity for Memphis State University, unlike the situation in Soni. Thus, in the case sub judice where no clear expression of waiver has been found, Soni would not be controlling.

Edelman v. Jordan

Plaintiffs contend that the refunding of previous excess tuition payments is not proscribed by the Supreme Court analysis of the Eleventh Amendment in Edelman v. Jordan, supra, 415

U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). They further argue that this type of refund is more in the nature of equitable restitution and therefore different from the retroactive welfare benefits denied in Edelman. We disagree.

The United States Supreme Court has never specifically addressed the problem of refunded excess tuition payments vis-a-vis the Eleventh Amendment. The pre-Edelman case of Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), aff'g, 346 F. Supp. 526 (D. Conn. 1972), does not support plaintiffs' effort to bypass the Eleventh Amendment. It is true that Vlandis affirmed the refunding of excess out-of-state tuition fees paid by students who were in fact Connecticut residents. The primary issue in Vlandis concerned state statutes creating irrebuttable presumptions of nonresidency. The Court found these to be violative of due process.

In Vlandis, however, the Eleventh Amendment issue was never briefed nor argued to the Court and was not discussed in the Court's opinion. 34/ The Court in Edelman disavowed prior cases which had granted monetary relief against the state without consideration of Eleventh

34/ See 41 U.S.L.W. 3263 (U.S. Nov. 7, 1972).

Amendment ramifications.35/ Although Vlandis was not specifically named by the Court as being among this group, we do not read the omission as indicating the Court's approval of refunding tuition fees in the face of Eleventh Amendment contentions. Since Edelman, and not Vlandis, fully explored the Eleventh Amendment area, it is Edelman which must necessarily control our decision in the case before us. The status of Vlandis is thus similar to that of Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). There the Supreme Court affirmed the granting of retroactive welfare benefits without mention of the Eleventh Amendment. The Court in Edelman explicitly disapproved Shapiro to the extent it conflicted with Edelman's Eleventh Amendment holding.

Edelman negates any sustenance which plaintiffs might get from the watershed case of Ex part Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The Court there held that the Eleventh Amendment did not bar a federal court

35/ See Sterrett v. Mother's & Children's Rights Org., 409 U.S. 809, 93 S.Ct. 68, 34 L.Ed.2d 70 (1972); State Dept. of Health & Rehabilitative Services of Fla. v. Zarate, 407 U.S. 918, 92 S.Ct. 2462, 32 L.Ed.2d 803 (1972), aff'g, 347 F.Supp. 1004 (S.D. Fla. 1971); Gaddis v. Wyman, 304 F.Supp. 717 (N.D. N.Y. 1969), aff'd per curiam sub nom., Wyman v. Bowens, 397 U.S. 49, 90 S.Ct. 813, 25 L.Ed. 2d 38 (1970).

from enjoining the Attorney General of Minnesota from enforcing a statute found to be in violation of the Fourteenth Amendment. To reach this result, Ex parte Young rested upon a fiction.36/ Since the officer was seeking to enforce an unconstitutional statute, that officer lost his cloak of state authority. At that point he began to operate without the official sanction of the state. This logically followed from the proposition that the state could not enforce an unconstitutional act.

> [T]he use of the name of the State to enforce an unconstitutional act to the injury of complaints is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to to the consequences of his individual conduct.

36/ See C. Wright, Handbook of the Law of Federal Courts § 48, at 186 (2d ed. 1970).

209 U.S. at 159-160, 28 S.Ct. at 454. Thus it became not a suit against the state at all. The officer was affirmatively enjoined to conform his conduct to constitutional requirements.

Edelman likewise involved a suit for injunctive relief against state officials for violation of federal regulations and the Fourteenth Amendment in administering the federal-state program of Aid to the Aged, Blind or Disabled. On the merits, the district court held the federal regulations to have been violated. The court ordered defendants to release and remit past benefits wrongfully withheld. The court of appeals affirmed. The Supreme Court affirmed as to the illegality of the action of the state officials. As to the damage issue, however, the Court held that ordering the remittance of retroactive benefit payments by the federal court was barred by the Eleventh Amendment. 415 U.S. at 658-659, 94 S.Ct. 1347.

Noting that in reality the benefits award by the district court would be paid from the general revenues of the State of Illinois, the Edelman Court held that

> a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.

415 U.S. at 663, 94 S.Ct. at 1356.

Thus, although Ex parte Young would support the injunctive relief ordered in this case, Edelman clearly bars financial relief against public funds. Since it is clear that any repayment of past tuition costs would necessarily come from state funds, we affirm the three-judge court's refusal to grant the refund. Our conclusion corresponds to that of the Sixth Circuit in a similar case which involved the refunding of tuition fees. See Long v. Richardson, supra, 525 F.2d at 75-76.

In its most recent decision on the Eleventh Amendment, the Supreme Court in Fitzpatrick v. Bitzer, ___ U.S. ___, 96 S.Ct. 2666, 49 L.Ed.2d ___ (1976) left unquestioned its holding in Edelman v. Jordan. Although Fitzpatrick permitted recovery of retroactive retirement benefits wrongfully withheld from plaintiffs on the basis of sex discrimination, the case is not controlling. Different from the case at bar was the presence in Fitzpatrick of federal legislation authorizing federal courts, under Title VII, to award money damages in favor of private individuals and against a state found to have discriminated in employment on the basis of race, religion, color, sex or national origin. ___ U.S. at ___, 96 S.Ct. 2666. See 42 U.S.C.A. § 2000e-2(a). This legislation had been passed pursuant to § 5 of the Fourteenth Amendment. Similarly in Edelman there was no express congressional legislation. Thus Fitzpatrick found a situation wholly unpresent in Edelman. The

Court in Fitzpatrick indicated that without this particular legislation the case would be governed by Edelman. But cf. National League of Cities v. Usery, ___ U.S. ___, 96 S.Ct. 2465, 49 L.Ed. 2d 245 (1976).

> Both parties in the instant case agree with the Court of Appeals that the suit for retroactive benefits by these parties is in fact indistinguishable from that sought to be maintained in Edelman, since what is sought here is a damage award payable to a private party from the state treasury.

Fitzpatrick v. Bitzer, ___ U.S. at ___, 96 S.Ct. at 2669 (footnote omitted).

Plaintiffs additionally argue that this is really a suit for equitable restitution and is therefore not barred by the Eleventh Amendment. Plaintiffs reason that, unlike the welfare benefit cases, repayment of these tuition fees is not akin to a damage claim but merely prevents unjust enrichment of the University. The excess fees would never have been collected but for the unconstitutional statue. Edelman's reliance on Ford Motor Co. v. Department of Treasury, supra, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), forecloses acceptance of plaintiffs' argument.

Ford Motor Co. was an unsuccessful suit by a nonresident plaintiff for refund of gross income taxes paid the Indiana Department of

Treasury. Like the excess tuition payments involved sub judice, the taxes were moneys paid by the taxpayer.

The two issues before the Court in Ford Motor Co. involved whether the suit was against the state, and whether Indiana consented to be sued. The ruled the suit to be against the state but held there had been no consent to suit. The opinion did not explicitly discuss whether a claim for equitable restitution could withstand an Eleventh Amendment challenge. In Edelman, however, Ford Motor Co. was cited as answering that question negatively.

> The term "equitable restitution" would seem even more applicable to the relief sought in that case [Ford Motor Co.], since the taxpayer had at one time had the money, and paid it over to the State pursuant to an allegedly unconstitutional tax exaction.

Edelman v. Jordan, supra, 415 U.S. at 669 94 S.Ct. at 1358.

Ford Motor Co. on its own might very well not support a broad denial of equitable restitution. The Edelman Court, however, construes that case to preclude such relief in spite of the inequities inherent in such a denial.

The Third Circuit has recently decided a case that on its face appears directly contrary to the Eleventh Amendment result reached on

this appeal. Samuel v. University of Pittsburg, ___ F.2d ___ (3rd Cir. 1976). Investigation below the surface of Samuel indicates that the case is inapposite to the appeal sub judice. The court in Samuel affirmed the granting of injunctive relief against defendant universities and state officials preventing the enforcement of a statewide residency rule on grounds of its unconstitutionality. That rule, for tuition purposes, required that the domicile of the wife is considered that of her husband's. The court also affirmed the district court's holding the universities liable for equitable restitution for the difference between the higher out-of-state tuition fees paid by married women residents because of the unconstitutional residency rule and the lesser in-state tuition charges.

A review of the district court's decision explains the apparent inconsistency between Samuel and the instant case. Samuel v. University of Pittsburgh, 375 F.Supp. 1119 (W.D. Pa. 1974). Three universities involved in the suit included the University of Pittsburgh, Temple University and Penn State University. The district court at length explored the relationship between the three universities and the

Commonwealth of Pennsylvania.37/ This argument was rejected. The district court found

37/ Samuel v. University of Pittsburgh, 375 F.Supp. 1119 (W.D. Pa. 1974). The court explored the nature of these universities for purposes of determining their relation to the state under 42 U.S.C.A. § 1983. All three universities were found to be "persons" under § 1983.

> Close and conscientious scrutiny of the above figures [setting out the financial picture of each university], and of the other indicia of state control or lack thereof set out above, make it clear that Pitt and Temple are actually and statutorily possessed of sufficient independence from the control of the Commonwealth to constitute persons within the meaning of Section 1983.
>
> * * * * *
>
> Under this state of facts, this Court finds that the Commonwealth does not exercise such actual or potential control over the operations of Penn State as to render that institution a state instrumentality as that term is meant in a Section 1983 context.

375 F.Supp. at 1127.

the universities not to be state instrumentalities. 38/ As we documented in the Suit Against the State? section of this opinion, unlike the universities involved in Samuel, M.S.U. is one and the same with the State of Mississippi. Therefore the cosmetic similarity between these two cases does not withstand analysis. In the notation of issues involved in the Samuel appeal the court made no mention of a challenge to the district court's findings as to the universities private status. The Third Circuit found the universities to be liable for restitution:

> The [district court] found that the Universities were unjustly enriched in that they

38/ Only if the defendant universities were deemed to be state instrumentalities could they be held to enjoy sovereign immunity. The status of each of the three defendant universities has been discussed and described in some detail in the preceding section hereof and none of them have been found to be state instrumentalities. Each of the defendant universities has been found to be an essentially private institution, insofar as the term "private" connotes an absence of state control over its operation. Since the three universities function autonomously from the state and have been found to be persons under Section 1983, the defense of sovereign immunity is unavailable to them.

375 F.Supp. at 1128. (emphasis supplied).

> wrongfully secured a benefit which it would be unconscionable for them to retain. We agree with this conclusion. 39/

___ F.2d at ___. In light of the district court's extensive discussion of the essentially private nature of the universities, and the Third Circuit allowing restitution from those universities, it

39/ Defendants in Samuel also included state officials and university officials. The state officials argued that the Eleventh Amendment immunity prevented a suit against them for injunctive and declaratory relief. This argument was rejected on the basis of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). 375 F.Supp. at 1129. The court held that defendant state officials were not liable for restitutionary payments. Id. at 1135. The court, moreover, rejected the notion that once state officials were enjoined in federal court despite the Eleventh Amendment may also be liable for restitution. The court cited Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) as to the same effect. 375 F.Supp. at 1135 n.17.

As to defendant university officials the court stated that they were not state agents since the schools that employed them were not state instrumentalities. The court also noted that these individuals "are not personally liable themselves for restitution . . .." 375 F.Supp. at 1135 n. 18.

cannot be said that Samuel contravenes those principles relied on in the instant case.

Finally, the case of Atchison T. & S. F. Ry. v. O'Connon, 223 U.S. 280, 32 S.Ct. 216, 56 L.Ed. 436 (1912), is of no help to plaintiffs. Atchison simply was not an equitable restitution case because, as the Court noted, state law provided that

> "if it shall be determined in any action at law or in equity that any corporation has erroneously paid said tax to the Secretary of State," upon the filing of a certified copy of the judgment the auditor may draw a warrant for the refunding of the tax and the state treasurer may pay it. We must presume that a judgment in the present action would satisfy the law. (emphasis added).

Id. at 287, 32 S.Ct. at 218. Thus in Atchison recovery was based on a state statutory right where the statute effectively waived any Eleventh Amendment bar by the provision that any court judgment would effect repayment of taxes. Such is not the case here.

Effect of Fourteenth Amendment Violation on Eleventh Amendment Immunity

In their final argument plaintiffs contend that the Eleventh Amendment does not bar recovery for this Fourteenth Amendment

violation. Plaintiffs argue that the earlier enacted Eleventh Amendment (adopted 1798)40/ must give way to the Fourteenth Amendment (adopted 1868)41/ which protects individuals against state encroachment upon their rights to due process and equal protection of the laws. The major portion of plaintiffs' brief deals with this argument.

The three-judge court rejected this argument and held that the Eleventh Amendment barred recovery of excess tuition payments. In reaching this conclusion the court relied

40/ The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

41/ The Fourteenth Amendment provides:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

upon Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974). It recognized that although Edelman did not rest upon Fourteenth Amendment grounds,

> the sweep of the majority opinion [in Edelman] apparently leaves no room for distinguishing money demands made against a state because of Fourteenth Amendment transgressions, at least in such area, as here, where Congress had not passed enforcement legislation specifically directed against a state or states pursuant to Section 5 of the Amendment

379 F.Supp. at 1189. Accordingly, the court held that

> [w]ithout specific guidance from the Supreme Court, we hold that the issue of ordering refunds to plaintiffs is foreclosed and no longer an open question, despite the footnote observation in Justice Marshall's dissent.

Id. at 1189.42/

Of course, Edelman does not hold that the Eleventh Amendment absolutely proscribes all monetary relief against a state in a federal court, even in Fourteenth Amendment cases. Inso far as one Amendment may override the other, the question was left open in Edelman, as Justice Marshall recognized in his dissent.43/ Edelman is not, however, eliminated as an instructional device in attempting to come to grips with the sensitive constitutional issue raised by plaintiffs' arguments. The Edelman

42/ Justice Marshall stated in his dissent in Edelman,

> [i]t should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an amicus in this case. In view of my conclusion that any sovereign immunity which may exist has been waived, I also need not reach this issue.

415 U.S. at 694 n.2, S.Ct. at 1371.

43/ See note 42 supra.

Court expressly overruled, as being inconsistent with the Eleventh Amendment, a series of Fourteenth Amendment cases allowing assessment of damages against the state.44/

In Prout v. Starr, 188 U.S. 537, 23 S.Ct. 398, 47 L.Ed. 584 (1903), the plaintiffs obtained an injunction against the state attorney general's enforcement of an allegedly unconstitutional statute, arguing that they would otherwise suffer loss of property without due process of law. The court affirmed the injunction. The eleventh Amendment was asserted as a defense. In an approach similar to that taken later in Ex parte Young, 209 U.S. 123, S.Ct. 441, 52 L.Ed. 714 (1908), the Prout Court stated that when a state officer attempts to enforce an unconstitutional statute, a suit against him "is not a suit against the State within the meaning of that amendment." 188 U.S. at 543, 23 S.Ct. at 400. See Smyth v. Ames, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819 (1898). In discussing the relationship of the Eleventh Amendment with other constitutional amendments, the Court worked from the basic premise that

> [t]he Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity.

44/ See Edelman v. Jordan, supra, 415 U.S. at 670-671 and n.13, 94 S.Ct. 1347. See also note 35 supra.

Id. 188 U.S. at 543, 23 S.Ct. at 400. Consequently, the Court recognized that one of its important functions is to interpret the various provisions and limitations of the Constitution so "that each and all of them [should] be respected and observed." Id. at 544, 23 S.Ct. at 401.

In Ex parte Young, supra, the Court again recognized this constitutional tension but did not have to resolve the issue in deciding that case. The Court however, did state that

> [w]e may assume that each [the Eleventh and Fourteenth Amendments] exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.

Id. 209 U.S. at 150, 28 S.Ct. at 450. See C. Wright, Handbook of the Law of Federal Courts, § 48, at 185 (2d ed. 1970).

The exact parameters of the Eleventh Amendment, when juxtaposed with the Fourteenth Amendment, do not appear to have been considered before by this Court. See Mobil Oil Corp. v. Kelley, 493 F.2d 784, 786-787 n.1 (5th Cir.), cert. denied, 419 U.S. 1022, 95 S.Ct. 498, 42 L.Ed.2d 296 (1974); Louisiana State Bd. of Educ. v. Baker, 339 F.2d 911, 914 (5th Cir. 1964). We conclude, however,

that in the case sub judice, the Fourteenth Amendment, though ratified last, does not preempt the operation of the Eleventh Amendment's bar against recovery of the excess tuition payments from the state in a federal court. Recognizing the need for a balance of the conflicting Amendments, we find that such a resolution satisfies the interests of both Amendments. The state officials have been enjoined from enforcing an unconstitutional act to the deprivation of the plaintiffs' Fourteenth Amendment rights, and the state's fiscal interest has been preserved under the Eleventh Amendment.

The Supreme Court's recent decision in Fitzpatrick v. Bitzer, ___ U.S. ___, 96 S.Ct. 2666, 49 L.Ed.2d ___ (1976), does not alter the result reached in this case. Fitzpatrick brought a class action on behalf of all present and retired male employees working for the State of Connecticut. The complaint charged that certain statutory provisions of Connecticut's retirement benefit plan discriminated against the plaintiffs on the basis of sex in violation of Title VII of the Civil Rights Act of 1964. An injunction issued, but the district court held the recovery of retroactive benefit payments prohibited by the Eleventh Amendment since they would be paid from the state treasury. On this point the Second Circuit affirmed. Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir. 1975). The Supreme Court reversed.

The Court held that the Eleventh Amendment may be effectively preempted by congressional legislation enacted pursuant to the enforcement provision of section 5 of the Fourteenth Amendment, which provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Court said,

> we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see Hans v. Louisiana, 134 U.S.1 [10 S.Ct. 504, 33 L.Ed. 842] (1890), are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. * * * When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

___ U.S. at ___, 96 S.Ct. at 2671.45/ Fitzpatrick holds that the balance between the

45/ In cases arising prior to Fitzpatrick, at least two other Circuits addressed, not for purposes of a court holding, the Fourteenth vis-a-vis Eleventh Amendment argument. In

Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974), the court confronted, inter alia, the problem of attorney's fees in a teacher discharge case. Within the case were problems of both First and Fourteenth Amendment dimensions. In footnote 7, the court recognized Justice Marshall's statement of Edelman not deciding the Fourteenth Amendment question thus leaving open the effect that Amendment had on the Eleventh. The court, however, thought Edelman disposed of the issue. "We thing Edelman must be read as closing the door on any money award from a state treasury in any category." 501 F.2d at 42-43 n.7. One category to which the court referred was a money claim against the state based upon the Fourteenth Amendment, which binds the states directly, and upon section 5 of the Fourteenth, which gives Congress the power to create remedies. Part of the remand in that case was for a determination of College's status to the state. Skehan, however, was vacated and remanded by the Supreme Court for further consideration in light of Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed. 2d 141 (1975), and Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). Skehan v. Board of Trustees of Bloomsburg State College, 421 U.S. 983, 95 S.Ct. 1986, 44 L.Ed. 2d 474 (1975). Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974), cert. denied, 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975), concerned a reapportionment challenge on both Fourteenth and Fifteenth Amendment grounds. The

court in Jordon quoted in the text of the opinion the Skehan footnote 7, in full, and concluded that Edelman precluded an award of attorney's fees against the state. 500 F.2d at 709. By the fact that Jordon involved Fourteenth Amendment claims, and its recognition of the potential conflict between the Eleventh and Fourteenth Amendments, it is also apparent that Edelman was read as barring any money award from the state treasury.

Eleventh and Fourteenth Amendments must be struck in favor of the Fourteenth, when Congress has passed specific legislation pursuant to section 5 to enforce the rights guaranteed by the Fourteenth Amendment. In such cases monetary relief recoverable directly from the state treasury will be allowed.

No enforcing legislation is involved in the instant case. The very fact that the Fitzpatrick Court relied on legislation, authorized by the enabling section of the Fourteenth amendment, supports the necessity of such legislation for recovery of money from the state by a person whose Fourteenth Amendment rights have been violated. Authority cited by the Court in Fitzpatrick mandates this requirement. See Ex parte Virginia, 100 U.S. (10 Otto.) 339, 347, 25 L.Ed. 676 (1880). Language in Fitzpatrick further supports this position.

> We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment,

> provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See Edelman v. Jordan, supra; Ford Motor Co. v. Department of Treasury, supra.

___ U.S. at ___, 96 S.Ct. at 2671 (footnote omitted). Absent further direction from the Supreme Court, and where no section 5 legislation has been passed, our holding here is in keeping with the historical balance placed upon a coterminous recognition of the Eleventh and Fourteenth Amendments. Whether the Supreme Court would hold that the Fourteenth overrides the Eleventh Amendment, distinguishing Edelman and Ford Motor Co. on the ground that those cases never reached the merits of any Fourteenth Amendment violation, is a determination that must rest with that Court. Fitzpatrick concerned only the situation in which section 5 legislation was present. The case of the Jagnandans is therefore dissimilar. Accordingly, we must reject plaintiffs' argument.

We point out, however, that our reading of the current status of Supreme Court determinations on the Eleventh and Fourteenth Amendments might well be affected by the treatment on appeal of a recent three-judge court case. Mauclet v. Nyquist, 406 F.Supp. 1233 (W.D.N.Y.), appeal sub. nom., Rabinovitch v. Nyquist, 45 U.S.L.W. 3007 (U.S. July 13, 1976) (No. 75-1809). Mauclet involved a suit by resident aliens of New York State challenging an education law which required applicants for state financial aid to be a United States citizen, or to have expressed

the intent to become such a citizen. The court held the law to be unconstitutional and mandatorily enjoined defendant state officials from enforcing its provisions. On the basis of Edelman the court denied plaintiff Rabinovitch money damages for past assistance moneys withheld by defendants. 406 F.Supp. at 1236. One issue being raised by Rabinovitch on appeal is whether the Fourteenth Amendment of its own force and absent enforcement legislation, constitutes a limitation to the Eleventh Amendment's bar to awarding money judgements against the state in a federal court.[46/] With this issue before the Supreme Court, the question is whether we should postpone consideration until Rabinovitch has been decided.

46/ The specific issue being raised, as reported, is as follows:

> Does Fourteenth Amendment, of its own force, constitute limitation on sovereign immunity bar of Eleventh Amendment so that, even absent specific statutory declaration authorizing money judgement against state in suit brought to enforce Fourteenth Amendment rights, federal court may enter judgement awarding money damages against state where, in its discretion, such relief is necessary and appropriate to fully vindicate constitutional rights and to deter future violations of constitutional proscriptions?

45 U.S.L.W. 3007 (U.S. July 13, 1976).

Rabinovitch, however, will not be decided until the next Supreme Court term, so that delay would be significant. In addition, despite the direct issue concerning the Eleventh and Fourteenth Amendments in Rabinovitch, the Court may not fully discuss that issue, for the Court in past three-judge court appeals has sometimes found it unnecessary to discuss all issues raised. See Edelman v. Jordan, supra, 415 U.S. at 670, 94 S.Ct. 1347. Moreover, the contentions of the Jagnandans have Eleventh Amendment considerations apart from and beyond those being raised in Rabinovitch. These other issues, along with interpretation of the Eleventh vis-a-vis Fourteenth Amendment, might themselves be reviewed by the Supreme Court in this case in light of the similar issue raised in Rabinovitch. Accordingly, we determine it to be more beneficial for all parties concerned to release this decision now.

AFFIRMED.

JOHN R. BROWN, Chief Judge (concurring):

I concur fully in Judge Roney's opinion for the Court and all of the views so ably expressed by Judge Goldberg.

I would add only two things.

First, the term "pro tanto repeal" of the Eleventh by the Fourteenth seems unduly harsh. One constitutional provision can in its application be modified without imputing to the great electorate an undisclosed purpose to "repeal"

an earlier provision. Responding to our earnest supplication does not present to the High Court the awesome prospect of repeal.

Second, this is in no sense merely an intriguing question to constitutionalists. It is presented in raw form. On today's holding appeallants lose all monetary recovery for money which Mississippi now wrongfully retains. Except by the luck of unpredictable timing Rabinovitch (or others) may or not afford any realistic relief. Nor will the issue down, as witness our own experience these past two years as we struggle with the Eleventh's restriction on meaningful recompense for often flagrant violations of the Fourteenth. Gates v. Collier, 5 Cir., 1973, 489 F.2d 298 (panel) 1975, 522 F.2d 81 (en banc); Newman v. Alabama, 5 Cir., 1974, 503 F2d 1320 (panel), 1975, 522 F.2d 71 (en banc).

GOLDBERG, Circuit Judge, with whom BROWN, Chief Judge joins (concurring).

I concur fully in the excellent opinion authored by my brother Roney. I write separately to voice concerns which render concurrence uneasy, and to emphasize considerations which render concurrence necessary.

The fourteenth amendment exercises a benign and ubiquitous influence on our jurisprudence, and occupies a central position in our society's notions about basic justice. The first section of the fourteenth amendment provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

That language affords clear and unequivocal protection of individual rights against actions of a state. It seems fair to assume that the supporters and ratifiers of the amendment intended that an individual have remedies against a state's abrogation of fourteenth amendment rights sufficient to give those rights meaning as more than a declaration "of the moral duty of the State." Cf. Ex parte Virginia, 100 U.S. (10 Otto) 339, 347, 25 L.Ed. 676, 679 (1880). That the Civil War amendments were meant "to serve as a sword, rather than merely as a shield, for those whom they were designed to protect" was confirmed in Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Edelman v. Jordan, 415 U.S. 651, 664, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662, 673 (1974).

In this case the eleventh amendment is presented as a limit on the full panoply of individual remedies against a state that the fourteenth amendment might otherwise provide. The eleventh amendment reads:

> The judicial power of the United States shall not be construed to extend to any suit at law or equity, commenced or prosecuted against one of the United States by Citizens of

> another State, or by Citizens or Subjects of any Foreign State.[1]

This amendment was adopted to reverse the Supreme Court's 1793 holding in Chisolm v. Georgia, 2 U.S. (2 Dal.) 419, 1 L.Ed. 440, that a state was liable to suit in federal court by a citizen of another state. Principal concerns in the ratification of the eleventh amendment included the desire to permit states to retire outstanding Revolutionary War debt without the intervention of federal courts, and the wish to avoid litigation seeking restitution of confiscated Loyalist property or restoration of lands that arguably had been improperly condemned by states.[2]

1/ At the time this suit was filed, the Jagnandans were citizens of Guyana, and thus the eleventh amendment was applicable to this suit in its literal terms. Cf. Fitzpatrick v. Bitzer, ___ U.S. ___, ___, 96 S.Ct. 2666, 2672, 49 L.Ed. 2d ___, ___ (Brennan, J., concurring in the judgement).

2/ See C. Jacobs, The Eleventh Amendment and Sovereign Immunity 64-67 (1972); Note, "The Supreme Court, 1973 Term," 88 Harv. L. Rev. 43, 243, 246-47 (1974).

That there might be conflict between the vindication of rights protected against the states by the fourteenth amendment and the immunity from suit established for the states by the eleventh amendment is apparent. Situations are easily imaginable (the case at bar is a good illustration) in which the policies embodied in the fourteenth amendment's protection of individual rights against the states must be substantially frustrated if the eleventh amendment is read to provide immunity for the states in regard to any recovery of wrongfully taken money. Appellants in this case have presented arguments based largely on legislative history that the later enacted fourteenth amendment must be seen as pro tanto repeal of the eleventh amendment's strictures on suits against the state. I find these arguments persuasive.

The Supreme Court has clearly recognized that the fourteenth amendment acts as a limit on the eleventh in some contexts. Ex parte Young, supra, relying on the fiction discussed by Judge Roney, found that the fourteenth amendment authorized prospective injunctive relief in a suit effectively against the state. Fitzpatrick v. Bitzer, ___ U.S. ___, 96 S.Ct. 2666, 49 L.Ed. 2d ___ (1976) demonstrates that the fourteenth amendment has in at least one other significant way carved an exception into the protection that the eleventh amendment would otherwise provide for state fiscs. Fitzpatrick holds that proper congressional exercise of its legislative powers under section 5 of the fourteenth amendment can serve to abrogate the states' eleventh

amendment immunity.3 / Section 5, then, represents a license for the Congress, in the context of enforcing fourteenth amendment rights of individuals against the states, effectively to repeal the eleventh amendment pro tanto.

As Judge Roney indicated, no congressional legislation under section 5 is a factor in this case. The district court nevertheless found that the fourteenth amendment rights of these plaintiffs had been violated by the state. The finding is unchallenged on appeal. The question thus arises whether the fourteenth amendment of its own force acts to modify the eleventh amendment in the context of an individual's suit against a state for money taken from him by the state in violation of the fourteenth amendment.4/

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3 / Section 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

4 / As Judge Roney has ably demonstrated, once it is determined that the monetary relief sought here is in effect sought to be recovered from the state, cf. Mississippi Gay Alliance v. Goudelock, 536 F. 2d 1073, 1084-85 (1976) (Goldberg J., dissenting), the eleventh amendment strictures reaffirmed in Edelman are not avoidable on any ground short of pro tanto repeal of the eleventh amendment by the fourteenth amendment. As to waiver, there has been no "clear declaration of the state's intention to submit its own creation, "Great Northern Insurance Co., v. Read, supra, 322 U.S. at 54, 64 S.Ct. at 877, quoted with approval in Edelman v. Jordan, supra, 415 U.S. at 673, 94 S.Ct. 1347. The "Equitable restitution" argument is foreclosed by Ford Motor Company v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L. Ed. 389 (1945), as interpreted in Edelman and cited in Fitzpatrick.

If no self-executing pro tanto repeal can be found, then the full vindication of fourteenth amendment rights must be contingent upon affirmative congressional legislation under section 5.

Were I writing on a clean slate, I would hold that section 5 of the fourteenth amendment is insufficient to insure the full potency of the rights sought to be protected by section 1 of the fourteenth amendment. I have no doubt that the framers and ratifiers of the fourteenth amendment had great faith in the inclination and ability of the federal Congress to enforce the rights guaranteed against the states by the fourteenth amendment. In view of the subsequent interpretations of the fourteenth amendment, however, it would be ironic indeed were the full vindication of the rights guaranteed against the states to be seen as contingent upon affirmative legislative action of "The State."

The fourteenth amendment, through the constitutional history of our country, has demonstrated great absorptive powers. That amendment is properly read today as having incorporated, for the protection of the individual against the state, the fundamental rights enumerated in the Bill of Rights. Thus, the fourteenth amendment protects individuals against, inter alia, the same types of arbitrary and unfair acts on the part of state government that originally prompted the Bill of Rights' protection for individuals against the federal government. The Congress cannot realistically be expected to provide fully adequate remedies for every

fourteenth amendment violation, because such violation often reflect the type of overreaching that tempts all governments. Accordingly, the fourteenth amendment's promise of full protection of individual rights might remain unfulfilled in many cases were section 5 the only path around the limitations of the eleventh. The conflict between the fourteenth and the eleventh amendments should not be understood only as a question of allocation of powers between the state and federal sovereigns. Although it is clearly appropriate for the federal sovereign to muscularize the potency of the fourteenth amendment through selective repeal of the eleventh amendment, see Fitzpatrick v. Bitzer, supra, primacy of individual rights requires more than section 5 for full and lasting effectuation. Absent strong countervailing indications from Supreme Court cases, I would hold that in situations like the one before us, the fourteenth amendment of its own force has acted to repeal the eleventh amendment pro tanto.

As Judge Roney has demonstrated, however, such countervailing indications are not absent. The emanations from Eldeman and Fitzpatrick make it seem very unlikely that a majority of the present Supreme Court would sustain a holding that the fourteenth amendment, of its own force, represents a pro tanto repeal of the eleventh amendment.

Edelman's discussion of Shapiro v. Thompson5/ and prior summary affirmances must be seen as weighing heavily against the likelihood of such a holding.6/

5/ 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

6/ The concerns about Edelman expressed by Mr. Justice Stevens, concurring in the judgment in Fitzpatrick, seem apposite to my dilemma here:

> Although I have great difficulty with a construction of the Eleventh Amendment which acknowledges the federal court's jurisdiction of a case and merely restricts the kind of relief the federal court may grant, I must recognize that it has been so construed in Edelman v. Jordan, . . . and that the language of that opinion would seem to cover this case.

___U.S. at ___, 96 S.Ct. at 2673, 49 L.Ed.2d at ___ (footnote and citations omitted). Once I have acknowledged, with Judge Roney, that the language of Edelman "would seem to cover this case," I am not so free as Justice Stevens, to argue that the language of Edelman should be read only in light of its narrow holding.

Further, the concern in Fitzpatrick with the "threshold fact of congressional authorization," ___U.S. at ___, 96 S.Ct. at 2670, 49 L.Ed.2d at ___, quoting Edelman v. Jordan, supra, lends strong implicit support to the view that without that threshold fact, the strictures of the eleventh amendment are likely to be interpreted as absolute, under Edelman.7/

7/ The following language from Fitzpatrick, also quoted by Judge Roney, suggests that the case was decided on the assumption that without section 5 legislation a state's eleventh amendment immunity under Edelman is impenetrable:

> . . . We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See Edelman v. Jordan, supra; Ford Motor Co. v. Department of Treasury, supra. ___U.S.___, 96 S.Ct. at 2671, 49 L.Ed.2d at ___.

A Supreme Court decision that the fourteenth amendment acted as a self-executing pro tanto repeal of the eleventh would not necessarily render the Fitzpatrick section 5 holding superfluous, but would certainly diminish the importance of that holding. Fitzpatrick would remain significant in situations when the violation of Congressional Section 5

legislation did not necessarily constitute a violation of the fourteenth amendment itself. Cf. Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

When the Supreme Court's recent opinions have so firmly, if implicitly, indicated how a majority of the Justices would answer this important constitutional question, a court at this level is not free simply to note that the question is formally open and then to decide it contrary to those indications on the grounds of policy and the legislative history of the fourteenth amendment. Obeisant and submissive, then, as I must be to these emanations from the Supreme Court, I must join with Judge Roney in holding that, absent Congressional authorization, the current state of the jurisprudence precludes retroactive recovery of damages from the state treasury by an individual, even when that individual has proven that the state, to his damage, has violated his fourteenth amendment rights.

Having said all this, I also with to emphasize that it is open for the Supreme Court to reverse our holding today without overruling any of its prior cases. As Mr. Justice Marshall noted, in dissent, in Edelman:

" . . . [T]here has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immuni-

ty may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment . . . "
415 U.S. at 694 n. 2, 94 S.Ct. at 1371 n. 2, 39 L.Ed.2d at 690 n. 2. Indeed, the Court conceivably could find in the instant case, in which the "equitable restitution" argument seems strong, a narrow and most compelling situation in which the accommodation between the policies of the fourteenth amendment and the eleventh amendment must lie on the side of full potency of the fourteenth amendment.

Again, however, I must agree with Judge Roney that by far the strongest indications are that the ultimate accommodation reached by the present Supreme Court will not include any exceptions for situations in which the fourteenth amendment acts as a self-executing pro tanto repeal of the eleventh amendment's proscription on retroactive money recoveries from the states. Until the Supreme Court advises us otherwise, we must hold that the full remedies which might be implied under the fourteenth amendment require activation by Congress through section 5 legislation, or by a state herself through express waiver.

This most important issue may be frontally addressed and authoritatively resolved in Rabinovitch or in some other case in the near future. The question certainly merits direct and definitive Supreme Court attention. Through this concurring opinion, I sound a note of supplication that the Court might consider the wisdom

of rejecting the implications of Edelman that we have found controlling, and of holding that the eleventh amendment has been modified to the extent necessary fully to effectuate the sweeping mandate of the fourteenth amendment.

APPENDIX B

No. EC 73-9-K
UNITED STATES DISTRICT COURT
N. D. MISSISSIPPI

EDWARD R. JAGNANDAN et al.,
Plaintiffs,

v.

WILLIAM L. GILES et al.,
Defendants.

Aug. 15, 1974

Before Coleman, Circuit Judge, and Keady and Smith, District Judges.

Keady, District Judge.

This class action was instituted by three resident aliens declared ineligible for resident status for tuition purposes at Mississippi State University. Plaintiffs and their purported class challenge the constitutionality of § 37-103-23, Miss. Code Ann. (1972)[1] which classifies alien students as

1/ Although § 37-103-23 was formerly designated as § 6800-11(11), Miss. Code Ann. (Supp. 1972), and is so referred to in the complaint, our reference will be to the 1972 recodification which took effect November 1, 1973.

nonresidents for the purpose of charging tuition and fees incident to attending a state-supported institution of higher learning. Defendants named in the complaint are William L. Giles, President of Mississippi State University, and William R. Nettles, Jr., Assistant to the Vice-President for Business Affairs at the University. The court, on its own motion, ordered that the Board of Trustees of the State Institutions of Higher Learning, the governing authority of Mississippi's senior colleges and universities, be joined as a party defendant needed for just adjudication. Rule 19(a), F.R.Civ.P.

Plaintiffs seek injunctive and declaratory relief and damages under 42 U.S.C. § 1983 for deprivation of rights, privileges and immunities secured by the Constitution and by 8 U.S.C. § 1101 et seq. Additionally, plaintiffs seek reasonable attorney fees. Jurisdiction is asserted under 28 U.S.C. § 1343(3) and (4).

Plaintiffs having sought to restrain the enforcement and application of a state statute upon the ground of federal unconstitutionality, a three-judge court, requisite under 28 U.S.C. §§ 2281 and 2284, was duly convened to hear and determine the action.

By agreement of the parties, the case is submitted upon a record which consists of stipulation of certain facts, affidavits and depositions. Defendants have raised certain defenses, including a Rule 12(b) motion to dismiss. The parties have, however, been afforded full opportunity to submit extensive memoranda on all ques-

tions raised by the pleadings and proof. Although the issues raised for decision are primarily of a legal nature, we first set forth the relevant facts which are largely undisputed.

The named plaintiffs are Edward R. Jagnandan and Leonard Susil Jagnandan, minors asserting their claims by their father, W. L. Jagnandan, who also prosecutes his individual claim. These persons are aliens and citizens of the Republic of Guyana (formerly British Guiana in South America). Plaintiffs lawfully entered the United States on or about July 31, 1969, and, although aliens, they are classified as permanent residents by the United States Immigration Service. Plaintiffs' unimpeached deposition testimony establishes that W. L. Jagnandan and his family in September 1969 voluntarily moved to Clay County, Mississippi, where they have since lived and maintained a household; that W. L. Jagnandan has been gainfully employed as Minister of Trinity Presbyterian Church at West Point, paying Mississippi State income taxes and also owning an automobile registered in Clay County. Edward and Leonard Jagnandan, both unmarried minors, resided in the family home. All three plaintiffs hold Mississippi drivers' licenses and regularly commuted 20 miles from their home to the university campus during school terms. Each plaintiff testified without reservation or qualification that he has no present intention of leaving the state, and his purpose is to reside indefinitely in Mississippi.

Edward R. Jagnandan and Leonard Susil Jagnandan enrolled as full-time students at Missis-

sippi State University for the 1970 fall term. Upon the filing of this action on January 8, 1973, Edward was a University student in good standing; Leonard, although academically suspended in 1972, was eligible for probationary readmission in June, 1973.2/ Rev. Jagnandan entered the University in the 1972 spring semester as a candidate for a master/s degree. He was thus in good standing as a "special student", having enrolled for less units than required of a full-time student.3/ At all pertinent times, general fees and tuition charges were separately established for resident and nonresident students, a higher rate ($300 more per semester) being required of nonresidents.

In September 1970, contemporaneous with the commencement of Edward's and Leonard's matriculations at the University, Rev. Jagnandan sought an appointment with University officials to establish his family's eligibility as state residents for tuition purposes. Pursuant to instructions, Rev. Jagnandan applied to Lynn D. Furgerson, the University's Director of Admissions and Registrar, setting up pertinent facts. Furgerson's adverse determination was reviewed and upheld by

2/ The record does not reflect whether Leonard reentered the University at the expiration of the probationary period.

3/ Rev. Jagnandan's deposition indicates that in May 1973 he was awarded a master's degree from the University.

the Residency Appeals Committee, composed of faculty and staff members. This action was later approved by President Giles. Upon being notified that they were ineligible for resident tuition rates, plaintiffs sought no further administrative relief, and instituted this federal action.

The named plaintiffs contend that at all times during their attendance as university students, they were eligible to be deemed residents of Mississippi for tuition purposes but for their alien status. Miss. Code Ann. § 37-103-1 (1972) provides:

> "The board of trustees of each junior college in this state, the board of trustees of state institutions of higher learning, and the administrative authorities of each institution governed by said boards, in ascertaining and determining the legal residence of and tuition to be charged any student applying for admission to such institution shall be governed by the definitions and conditions set forth in Sections 37-103-1 to 37-103-23."

The relevant definition appears in § 37-103-23, which provides:

> "All aliens are classified as nonresidents."

Plaintiffs thus maintain that the foregoing statutory requirement, on its face, violates rights, privileges and immunities secured to them by the Constitution as well as the laws of the United States. More specifically, plaintiffs

urge that the state's statutory definition impinges on the constitutional right to equal protection and due process of law granted by the Fourteenth Amendment, as well as the rights to travel interstate and of free association guaranteed by Article IV, § 2 of the Constitution, 4/ and the First, Fifth and Fourteenth Amendments. Plaintiffs also assert that the restriction placed by the challenged statute on aliens lawfully residing in Mississippi conflicts with the comprehensive and preemptive congressional scheme regulating the entry and residence of aliens in the United States imposed by 8 U.S.C. 1101 et seq., 5/ and required to be maintained inviolate by the Supremancy Clause

4/ Article IV, § 2, provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

5/ 8 U.S.C. § 1101 et seq. is a codification of the congressional statutes governing entrance and residence of aliens immigrating into the United States.

in Article VI of the Constitution. 6/

The precise question for our decision is whether Mississippi, by § 37-103-23, can validly classify as nonresidents persons who are lawfully admitted aliens residing in Mississippi, and thereby exact higher tuition rates at the State's colleges or universities than are charged to citizens residing in the State. Several subsidiary matters, however, first must be considered.

Defendants, at the outset, challenge our jurisdiction under 28 U.S.C. § 1343, upon the premise that § 1343 pertains only to actions brought by citizens of the United States, and not aliens. This contention is wholly without merit, since it is a long-settled proposition that aliens lawfully in the United States are entitled to the protection of the Fourteenth Amendment.

6/ Article VI of the Constitution provides, inter alia:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). Deprivation of rights secured under the Fourteenth Amendment, of course, gives rise to a cause of action in law, equity or other proceeding for redress by any citizen of the United States or other person within its jurisdiction. 42 U.S.C. § 1983. 28 U.S.C. § 1343(3), the jurisdictional counterpart of § 1983, confers original jurisdiction on a federal district court to determine civil actions of the aforementioned type. That plaintiffs are resident aliens and not citizens of the United States does not vitiate jurisdiction under 1343. Dougall v. Sugarman, 339 F.Supp. 906 (3-judge court S.D.N.Y. 1971), aff'd, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed. 2d 853 (1973); Richardson v. Graham, 313 F.Supp. 34 (3-judge court 1970), aff'd, 403 U.S. 365, 91 S. Ct. 1848, 29 L.Ed.2d 534 (1971). Moreover, jurisdiction is properly conferred on this court by 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgments Act), and §§ 2281 and 2284 (Three-Judge Courts).

Defendants also urge, as a jurisdictional challenge, that this suit is barred by the Eleventh Amendment which forbids any suit in federal court, in law or equity, against an unconsenting state by a citizen of any

foreign state.7/ Unquestionably, the explicit limitations of the Eleventh Amendment on the jurisdiction of federal courts has been consistently reaffirmed and followed by the courts. Employees v. Missouri Public Health Dept., 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973); Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); Aerojet General Corp. v. Askew, 453 F.2d 819 (5 Cir. 1972). The Eleventh Amendment provides no immunity for defendants here, however, since this suit is clearly brought not against the State of Mississippi, but against two individuals (Giles and Nettles) and the members of a state board who allegedly are impermissibly acting under the mandate of a state statute in violation of plaintiff's federal constitutional rights. Such a suit is permissible under the doctrine long ago established in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and ever since consistently adhered to by the Supreme Court. Having unassailable jurisdiction over the subject matter and the parties, this court may, in the event plaintiffs prevail on the

7/ Amendment XI--Suits Against States, provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

merits, surely enjoin the enforcement of an unconstitutional statute. A more serious Eleventh Amendment issue concerns the scope of additional relief allowable to plaintiffs, a question on which we defer present discussion.

Before considering the merits, we next address the issue of whether the action is maintainable as a class action. The complaint (Paragraph 4) seeks to define the plaintiff class as follows:

"4. Plaintiff is a member of a class of persons who are alien residents lawfully residing as permanent residents of the United States and who reside in Mississippi and who have been declared ineligible for admittance into Mississippi State University as residents of Mississippi for tuition purposes solely because such persons are not citizens of the United States."

Although class actions pursuant to Rule 23, F.R.Civ.P., have enjoyed widespread use in the field of civil rights litigation, such actions are certainly not without limitations imposed by both the Federal Rules of Civil Procedure and judicial decisions. In the case sub judice, we are unpersuaded that the action should proceed as a class action due to the failure of named plaintiffs to show that the requisite numerosity of class members exist under Rule 23(a) (1),

and that their joinder is impracticable.8/

The court first expressed concern as to the number of persons comprising the class defined in the complaint at a pretrial conference before the managing judge on June 1, 1973. The court then had before it the affidavit of Mr. Furgerson, the University Director of Admissions and Registrar, indicating that there were only six resident alien students, other than the three named plaintiffs, enrolled at the University from the September, 1970 semester, until May, 1973, who were assessed nonresident tuition. In response to the court's concern as to this apparently small number, plaintiffs' attorney moved ore tenus for permission, which was granted, to reexamine and redefine the class, by amendment or other means; nor is there any material in the record, by way of affidavit or otherwise, that asserts that the purported class is larger than the six members specified in the Furgerson affidavit. Obviously, such a small number of persons is readily accessible to joinder.

The diminutive number of persons comprising the class is emphasized by the deposition

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8/ Rule 23(a), F.R.Civ.P., provides, inter alia, that "[O]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, . . ."

testimony of Rev. Jangnandan (pp. 48-53), who stated that he knew of only three permanent-resident alien students, other than the named plaintiffs, who had attended Mississippi State at times pertinent to this suit.

The applicable standard in determining whether the conditions of Rule 23(a) (1) have been satisfied is succinctly stated in 7 Wright and Miller, Federal Practice and Procedure § 1762, p. 594, as follows:

> "Although the party instituting the action need not show the exact number of potential members in order to satify this prerequisite, he does bear the burden of showing impracticability and his mere speculation as to the number of parties involved is not sufficient. . . ." (Footnotes omitted).

Although the particular size of a class, even where of reduced numbers, is not necessarily the only factor that can weigh in favor of the propriety of a class action, Davy v. Sullivan, 354 F.Supp. 1320 (3-judge court, Ala. 1973); Thomas v. Clarke, 54 F.R.D. 245 (D.C. Minn. 1971); 7 Wright and Miller, Federal Practice and Procedure § 1763, p. 600, numerosity does remain a controlling consideration where neither the pleadings nor any evidence indicates the presence of other overriding considerations. This is particularly true where, as here, the size of the class is demonstrably small and all plain indications are that its alleged members could be joined

without undue burden on plaintiffs. Ward v. Kelly, 476 F.2d 963 (5 Cir. 1973).

Plaintiffs' counsel, in a supplemental legal memorandum urges us to interpret the class definition broadly by considering all resident aliens within Mississippi as members, or potential members, of the class. The argument is made that such aliens, who number more than 3,000, are appropriate members since they are inherently ineligible, by the broad sweep of § 37-103-23, for admittance as students with resident status at Mississippi State.

We reject plaintiff's contentions for two reasons. First, the named plaintiffs were granted leave to amend to redefine the class, but failed to do so. Second, even if plaintiffs' last minute interpretation were accepted, it would, in our view, constitute a class too indefinite in scope. DeBremaecker v. Short, 433 F.2d 733 (5 Cir. 1970). It is a fair conclusion from the Furgerson affidavit that very few aliens residing in Mississippi have sojourned in the state for the purpose of enrolling as students at Mississippi State. A well-settled rule of class actions is that the class description must be sufficiently definite. This principle is so stated in 7 Wright and Miller, § 1760, p. 581:

> "[T]he requirement that there be a class will not be satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is

> a member. This means that the class must not be defined so broadly that it encompasses individuals who have little connection with the claim being litigated; rather, it must be restricted to individuals who are raising the same claims or defenses as the representative." (Footnotes omitted).

We hold that the named plaintiffs may be permitted to proceed on their individual claims only, and not as representatives of a class.

Addressing the merits of plaintiffs' individual claims, their most compelling argument is that the present case falls squarely within the holding of the Supreme Court in Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971), and reiterated in Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973), and In Re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973).

In Graham, it was held that state statutes of Arizona and Pennsylvania denying welfare benefits to resident aliens or aliens who had not resided within the United States for a specified period of years were unconstitutional, as violative of the Equal Protection Clause. In reaching this conclusion, the court reaffirmed that an alien is a "person" within the meaning of the Equal Protection Clause, 9/ and stated that

9/ The Fourteenth Amendment provided: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

> classifications based on alienage are "inherently suspect" and subject to "close judicial scrutiny". The Court, speaking through Justice Blackmun, declared:
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> > "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." 403 U.S. at 372, 91 S.Ct. at 1852 (Footnotes and citations omitted).

Likewise, in Sugarman v. Dugall, supra, the Court, relying on Graham's reasoning, proclaimed that a state statute, which barred aliens from holding positions in the New York State competitive civil service system, was a denial of the equal protection guarantee. The Court, in Griffiths, again applying the Graham standard of review, struck down a Connecticut state-wide court rule, authorized by statute, which excluded aliens from admission to the practice of law.

Thus, plaintiffs submit that the rationale of Graham and its progeny are directly applicable to § 37-103-23, the statute under critical review. We are in full accord with plaintiffs' contentions. The classification created by § 37-103-23 indisputably imposes greater financial burden on alien students, who are bona fide residents of the State, to attend a Mississippi

institution of higher learning solely because they are not citizens of the United States. Such a distinction is inherently suspect as violative of the Equal Protection Clause. Absent a compelling state interest to justify classification based on alienage, the statute must fail.

We are unpersuaded by defendants' suggestion that since education is not a fundamental or basic constitutional right, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), the standard of strict judicial scrutiny is inapplicable. This position is demolished by settled doctrine, for a classification is subject to strict scrutiny where such classification is based on a suspect criterion like race, nationality, or, as here, alienage, irrespective of whether the classification impinges upon a fundamental or basic right. Graham, supra, 403 U.S. 365, 375-376, 91 S.Ct. 1848, 29 L.Ed.2d 534. It remains for us to examine critically the substantiality of the state's purpose of interests in the enforcement of § 37-103-23. Griffiths was quite explicit regarding the state's burden to justify the use of a suspect classification, viz:

> "The Court has consistently emphasized that a State which adopts a suspect classification 'bears a heavy burden of justification,' McLaughlin v. Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964) a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show

> that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary to the accomplishment' of its purpose or the safeguarding of its interest." at 413 U.S. 721, at 93 S.Ct. 2855, at 37 L.Ed.2d 915 (Footnotes omitted).

We perceive that defendants have, by no means, met the burden of justifying the classification of all aliens residing in Mississippi as nonresidents for college tuition purposes. The strongest proffer of a compelling state purpose is the notion that § 37-103-23 represents a reasonable exercise of sound state economic policy, which has a direct bearing upon the allocation of limited funds for educational purposes. This proposition is the substantial equivalent of the "special public interest" plea which Graham rejected. Although not precisely articulated as such in the case sub judice, defendants' claim is that a state enjoys a "special public interest" in favoring its own citizens over aliens in the distribution of the benefits of higher education where economic resources to support a program of higher education are limited.

The Supreme Court in Graham emphasized that whatever interest a state may have to limit or condition expenditures or preserve the fiscal integrity of its programs, such considerations are inadequate to justify invidious discrimination against aliens. It held as follows:

"[A] State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania'a making noncitizens ineligible for public assistance, and Arizona's restricting benefits to citizens and longtime resident aliens. First, the special public interest doctrine was heavily grounded on the notion that '[w]hatever is a privilege, rather than a right, may be made dependent upon citizenship.' But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege'. . . . Second, as the Court recognized in Shapiro: '[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification.'

"Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in Shapiro." (Citations omitted). 403 U.S. at 374-375, 91 S.Ct. at 1853. (Emphasis added).

Hence, although defendants may be concerned with the strain of educational financing and budget balancing--concededly such considerations do bear a rational relationship between the classification and a legitimate state purpose--they nevertheless fall short of constituting compelling need for the State to justify the classification created by § 37-103-23. Most assuredly, this is not to say that aliens may not be subjected to any residency requirement whatever for tuition purposes, but only that Mississippi cannot permissibly draw a distinction between residency requirements imposed on the student who is a United States citizen and one who is a lawfully admitted alien. By state statute, 10/ Mississippi permits a citizen to be admitted as a resident and become eligible for residency tuition rates at an institution of higher learning after he has continuously resided in Mississippi for a minimum of twelve months just prior to admission. It is precisely because § 37-103-23 mandates that lawfully admitted aliens may not be entitled to the same consideration after one year's uninterrupted Mississippi residency that the statute, on its face, creates an invidious

10/ § 37-103-3. Twelve months' residency required before admission as resident of state.

"No student may be admitted to any junior college or institution of higher learning as a resident of Mississippi unless his residence has been in the State of Mississippi for a continuous period of at least twelve months immediately preceding his admission."

discrimination and offends the Equal Protection Clause. The only admissible interpretation of § 37-103-23,11/ is that it applies to aliens as a class ("all aliens are classified as nonresidents"), and requires college officials to treat all noncitizens, whether resident or nonresident, alike for the purpose of imposing the higher, nonresident rate of tuition. Inasmuch as the statute allows no discretion whatever to the defendants in its application, Graham requires that we invalidate § 37-103-23 because of the explicit distinction which it impermissibly seeks to draw from the status of alienage.

Moreover, as applied to the plaintiffs, § 37-103-23 also violates the Due Process Clause of the Fourteenth Amendment. By its terms, the statute classifies as nonresidents all aliens wherever located and regardless of whether they may be, like the plaintiffs, aliens who are "lawfully admitted for permanent residence,"12/ and are bona fide residents of

11/ The section is one of fifteen statutes which regulate residency and fees of college students attending the State's educational institutions. §37-103-1 to 37-103-29.

12/ 8 U.S.C. § 1101 (a) (20): "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." (See also 8 U.S.C. §§ 1151 (a) and 1153 (h)).

Mississippi. That plaintiffs satisfy the residency criteria established by us in Cheek v. Fortune, 341 F.Supp. 729 (3-judge court, N.D. Miss. 1972), is not open to question, yet the statute bars the plaintiffs from having opportunity to show what is true, i.e., that they do reside in Mississippi. The effect of the statute, as readily seen, erects an irrebuttable and conclusive presumption, for charging a higher rate of tuition applicable to only nonresidents, to persons who nevertheless are lawfully admitted aliens having indisputably established residence in the state. This result is violative of plaintiffs' due process rights under the teaching of Vlandis v. Kline, 412 U.S. 441, 452, 93 S.Ct. 2230, 2236, 37 L.Ed.2d 63, 71 where the Supreme Court, by a 5 to 4 vote, held:

> "In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees at its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the instate rates. Since § 126 precluded the appellees from ever rebutting the presumption that they were nonresidents of Connecticut, that statute operated to

deprive them of a significant amount of their money without due process of law."

Since our decision that the challenged statute is void because of conflict with the Fourteenth Amendment is dispositive of the case, we find it unnecessary to reach alternative claims of constitutional and statutory protection raised by plaintiffs. (Ante, footnotes 4-6). Only the scope of relief remains to be determined.

Declaratory and injunctive relief to prevent future enforcement of § 37-103-23 against plaintiffs is, of course, appropriate; also, in the event the higher rate of tuition and fees for past semesters has not been collected from plaintiffs, payment thereof is excused. Plaintiffs seek damages, however, from defendants, including at least reimbursement for tuition and fees paid in excess of the amounts paid by resident students for the period of their enrollments. Such funds were granted in Vlandis by the three-judge District Court of Connecticut, 346 F.Supp. 526, and the Supreme Court affirmed without reference to the Eleventh Amendment.

Vlandis would be conclusive if it were not for the recent decision of Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), holding that the Eleventh Amendment barred a federal district court in Illinois from ordering state officials to remit AABD benefits wrongfully withheld from eligible welfare applicants. The majority, in an opinion by Justice Rehnquist, drew a clear distinction between a

money demand against a state payable out of its general revenues as falling within the Eleventh Amendment's ban, absent effectual waiver of immunity, and a demand for prospective equitable relief to deter future unconstitutional conduct by state officials, and explicitly decided that only the latter is permissible under the Ex Parte Young rationale. It is most pertinent that the Court disapproved the disposition of the Eleventh Amendment issue by its previous decisions which had summarily upheld lower federal courts ordering a state to make retroactive payments. Edelman, supra, 415 U.S. at 670, 94 S.Ct. at 1359, 39 L. Ed.2d at 676-677, fn. 13. It is in that light that we must construe Vlandis' affirmance, summarily ordering a refund of excess tuition without mention of the Eleventh Amendment. Unquestionably, the defendant university officials were under a statutory duty to charge plaintiffs the higher rate of tuition prescribed for nonresidents by the pertinent regulations; defendants were not unilaterally engaging in unconstitutional conduct not sanctioned by state law, or otherwise acting outside obligations imposed upon them by Mississippi statutes. Nor is there any question but that the refunds, if ordered, would not be paid by the defendants from personal funds, but would necessarily be a charge upon the state treasury, or at least that portion of the fisc dedicated to higher education. The suit, although nominally against State University officials, is in reality against the State of Mississippi. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct.

347, 89 L.Ed. 389 (1945).13/ It is certainly true that plaintiffs have paid to defendants, as unlawful exactions, excess tuition charges, which are readily ascertainable and modest in amount, and that such funds once belonged to plaintiffs.14/ Nonetheless, the size of the demand, whether large or small, can play no role in the applicability of the State's immunity, and the result of inequity, even of unjust enrichment, cannot invoke federal judicial power withheld by the Constitution. That an inequity may result from a court's failure or inability to restore to a party money which he paid to the State pursuant to an unconstitutional exaction does not remove

13/ The Court, in Ford Motor Co., at 323 U.S. 464, at 65 S.Ct. 350, at 89 L.Ed. 394, said:

"[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

14/ At the request of the court, defendants advise that the total nonresident tuition collected from plaintiffs is $3,495 allocated as follows: Edward R. Janandan, $1,200; Leonard Susil Jagnandan, $1,500, and Rev. W. L. Jagnandan, $795.

the case from the Eleventh Amendment. Presumably, under such circumstances it is up to the state to provide or not provide, as it may choose, some means--whether administrative, judicial or legislative--for granting monetary relief to persons harmed by the state's unconstitutional actions. This explication is clearly made in Edelman, by its adherence to Ford Motor Co., a 1945 decision, in these words:

> "There a taxpayer, who had, under protest, paid taxes to the State of Indiana, sought a refund of those taxes from the Indiana state officials who were charged with their collection. The taxpayer claimed that the tax had been imposed in violation of the United States Constitution. The term 'equitable restitution' would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money, and paid it over to the State pursuant to an allegedly unconstitutional tax exaction. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case." 415 U.S. 668, 94 S.Ct. 1358, 39 L.Ed. 2d 676.

Although the lower courts in Edelman found an impermissible conflict existed between the AABD federal regulations and those adopted by Illinois, and not a Fourteenth Amendment violation, the sweep of the majority opinion

apparently leaves no room for distinguishing money demands made against a state because of Fourteenth Amendment transgressions, at least in such areas, as here, where Congress had not passed enforcement legislation specifically directed against a state or states pursuant to Section 5 of the Amendment. We note that the plaintiffs in Ford Motor Co. v. Department of Treasury, 141 F. 2d 24 (7 Cir. 1944), raised constitutional challenges (burden on interstate commerce) which were decided adversely to the plaintiff, but this judgment was vacated for want of federal judicial power. Without specific guidance from the Supreme Court, we hold that the issue of ordering refunds to plaintiffs is foreclosed and no longer an open question, despite the footnote observation in Justice Marshall's dissent. 15/

It follows that the judgment of this court shall be limited to granting declaratory and injunctive relief against further enforcement of the void

15/ Fn. 2. "It should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an amicus in this case." 415 U.S. at 694, 94 S.Ct. at 1371, 39 L.Ed. 2d at 690.

statute and not require repayment of the excess tuition and other charges heretofore unconstitutionally exacted of the named plaintiffs.

As regards an attorney's fee sought by plaintiffs, the case is not one of such exceptional circumstances to justify allowance. The facts in no way establish that the defendants have committed acts which amount to unreasonable and obstinately obdurate conduct in the denial to the three plaintiffs of their constitutional rights. Neither may plaintiffs and their counsel be properly regarded as "private attorney generals" since their suit does not vindicate important congressional policies. Instead the defendant university officials have in good faith endeavored to comply with a statute previously unchallenged by anyone. Since neither basis which federal courts have alternatively employed in civil rights cases to award counsel fees is present here, 16/ we decline to award attorney fees to plaintiffs, either as a measure of relief or as incidental costs.

16/ Jinks v. Mays, 464 F. 2d 1223 (5 Cir. 1972) (enunciating unreasonable and obdurately obstinate standard), and Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed. 2d 1263 (1968) (enunciating the private attorney general concept).

APPENDIX C

No. EC 73-9-K
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Defendants.

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JUDGEMENT

This cause having been heard before a District Court of three judges convened in accordance with the provisions of 28 USC § 2281 et seq., and after considering the pleadings, stipulations, affidavits and other evidentiary materials, and also memorandum briefs submitted without oral argument, and the court having made findings of fact and conclusions of law incorporated in the Memorandum Opinion this date released, whereby plaintiffs are adjudged entitled to certain relief; it is

ORDERED

1. That Miss. Code Ann. (1972), § 37-103-23, reciting that: "All aliens are classified as nonresidents" for the purpose of

charging fees and tuitions to students for attending state-supported institutions of higher learning, is unconstitutional and in contravention of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution; and the defendants, William L. Giles, President of Mississippi State University, William R. Nettles, Jr., Assistant to the Vice-President for Public Affairs at Mississippi State University, the Board of Trustees of the Institutions of Higher Learning, their successors in office, and all persons acting in concert with them, be and they are hereby preliminarily and permanently enjoined, prohibited and restrained from further enforcing or applying the provisions of said Miss. Code Ann. (1972), § 37-103-23 so as to charge to, or exact from, aliens lawfully admitted for permanent resident in the United States, who reside in the State of Mississippi, college or university fees and tuition charges in excess of fees and tuitions charged to United States citizens residing in Mississippi.

2. Plaintiffs' demand for damages, or refund of excess charges heretofore paid by them to defendants, is denied.

3. Plaintiffs' demand for attorney fees is denied, but all costs of court are taxed to defendants.

The clerk of this court is directed to serve by United States mail a certified copy

of this order upon the named defendants and note such mailings on his docket.

This, 15th day of August, 1974.

s/ Jas. P. Coleman
United States Circuit Judge

s/ William C. Keady
United States District Judge

s/ Irma R. Smith
United States District Judge

Certificate of Service

I, Mark Shenfield, hereby certify that, on the 19th day of December, 1976, I mailed, postage prepaid, three copies of the foregoing Petition For A Writ of Certiorari to counsel for the Respondents:

Hon. Ed Davis Noble, Jr.
Special Ass't. Att'y Gen'l
Box 220
Jackson, Mississippi 39205

Mark Shenfield
Mark Shenfield